

**MAINTENANCE OF THE SURVIVING SPOUSE IN SOUTH AFRICA: THE
CHALLENGES FACED BY THE EXECUTOR**

by

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SUMMARY

The Maintenance of Surviving Spouses Act 27 of 1990 came into operation thirty years ago and has remained relatively unchanged since its promulgation. The stated objective of the Act is to provide the surviving spouse with a claim for maintenance against the estate of the deceased spouse in certain circumstances. This objective is sound, as it is evident from an analysis of the history of our law that legislation was needed to address the financial position of a survivor following the death of his or her spouse. The practical application of the Act is, however, not as robust as it does not always achieve the stated objective and often leads to unintended consequences.

This research has a dual objective. The first aim is to analyse the practical considerations when an executor applies the Act and to consider the challenges the executor must deal with when considering a maintenance claim under the Act. The second aim is to investigate possible solutions to these challenges and to consider whether there are viable alternative arrangements for the way in which a maintenance claim under the Act is handled.

The purpose of the study is to formulate a comprehensive recommendation for legislative reform of the Act so that the practical application of the Act achieves a result that reflects the objective of the Act.

KEY TERMS

Maintenance; Surviving spouse; Survivor; Executor; Maintenance of Surviving Spouses Act; Deceased estate; Reasonable maintenance needs; Own means; Life partnerships; Heterosexual life partners; Same-sex life partners; Religious marriages

LIST OF ABBREVIATIONS

CILSA	Comparative and International Law Journal of Southern Africa
Harv LR	Harvard Law Review
NZLJ	New Zealand Law Journal
PER/PELJ	Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SAJHR	South African Journal on Human Rights
SAPR/PL	SA Publiekreg/Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaags Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

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CHAPTER 1

INTRODUCTION AND PROBLEM STATEMENT

1.1 Introduction

It is often said that the only two certainties in life are death and taxes. This sentiment is partly echoed in a statement in the foreword to the first edition of *Die Suid-Afrikaanse erfreg*,¹ where it was said that knowledge of the law of succession is as essential for any balanced jurist as death is inevitable.

When a person dies and leaves assets and/or liabilities, his or her estate must be administered. One component of the administration process is the consideration and finalisation of claims lodged against the estate. These claims could include maintenance claims lodged on behalf of minor children, the surviving spouse² or partner, or dependants of the deceased.

Estate administration is the process through which the deceased person's liabilities and legal obligations to other persons are fulfilled or expunged, and thereafter the balance of the available assets of the deceased is transferred to those persons entitled thereto in terms of the deceased's testamentary wishes or by way of intestate division.³ There are various statutory provisions in South Africa that govern the different aspects of a deceased estate. These provisions are contained in various Acts and regulations, and all have varied focuses and address different aspects of a deceased estate.

The principal statute and reference source relating to deceased estates is the Administration of Estates Act 66 of 1965 (hereinafter referred to as the "Estates Act"),

¹ Van der Merwe & Rowland (1990).

² For purposes of this thesis, I use the terms "surviving spouse" and "survivor" as synonyms. See fn 26 for further details.

³ Abrie *et al Deceased estates* (2015) 48; Botha *et al Estate planning & fiduciary services guide* 2014 307.

as amended. It is the basic broad legislation governing the legal provisions relating to the administration and distribution of deceased estates.⁴ It deals mainly with the duties and powers of the executor, prescribes the processes to be followed in the administration of an estate and deals with other incidental matters, such as the appointment and role of a tutor and/or curator, minors' inheritances, the Guardian's Fund and testamentary trusts. It does not, however, give any direct guidelines for the determination of the devolution of an estate, and guidance in this regard needs to be sought in other pieces of legislation.

The Estates Act provides that when any person dies in the Republic of South Africa, leaving any property or any document that is or purports to be a will, his or her estate has to be reported to the office of the Master of the High Court ("the Master") that has jurisdiction over the estate.⁵ The estate of a deceased person cannot be dealt with or liquidated until an executor has been appointed by the Master.⁶ The Estates Act provides that no person shall liquidate or distribute the estate of any deceased person, unless letters of executorship have been granted to him or her by the Master.⁷ Once the executor is appointed, he or she must administer the estate and follow certain processes to deal with the assets and liabilities of the estate.

The executor has certain rights and powers that enable him or her to deal with the liquidation and distribution of the estate. He or she also has certain duties to fulfil.⁸ One of these duties is to consider claims lodged by creditors of the estate. Section 29 of the Estates Act provides that the executor shall, as soon as possible after letters of executorship have been issued to him or her, publish a notice in the Government Gazette and in one or more newspapers circulating in the district in which the deceased

⁴ Botha *et al* 389.

⁵ Section 7 read with section 4.

⁶ Meyerowitz D Meyerowitz *on estates and their taxation* (2010) 8.1.

⁷ Section 13.

⁸ Meyerowitz 12.1.

ordinarily resided at the time of his or her death.⁹ The purpose of the notice is to alert all persons with claims against the estate to lodge such claims with the executor within a period specified in the notice. This process will enable the executor to determine the debts for which the estate may be liable, which is an important step in determining the solvency of the estate.¹⁰ For purposes of this thesis, all references to estates are to solvent estates, unless the context indicates differently.

All claims that would have been capable of proof in the event that the estate was insolvent, may be lodged in terms of section 29.¹¹ The claims lodged against the estate could be in the nature of *inter alia* a medical bill, an outstanding amount on a mortgage bond or instalment sale agreement, outstanding income tax or a claim by a former spouse¹² or civil union partner¹³ in terms of a divorce order. Where the deceased had minor children, the executor often has to consider a claim for maintenance on behalf of such minor children.

As indicated above, the Estates Act deals with the basic principles of the administration of a deceased estate. Specific details on the distribution of an estate, and certain other aspects, are found in other pieces of legislation. The executor therefore has to be well-versed in all legislation relevant to the administration of a deceased estate. The legal

⁹ Subsection (1).

¹⁰ Section 34(1).

¹¹ In terms of section 44(1) of the Insolvency Act 24 of 1936, any liquidated claim, the cause of which arose before the date of sequestration, may be proved against the insolvent estate. Where a deceased estate is found to be insolvent, the creditors of the estate have the option to instruct the executor to surrender the estate in terms of the Insolvency Act. If they choose not to do so, the estate will be administered in terms of section 34 of the Estates Act and the date of sequestration of the estate will be regarded as the day following the last day on which the creditors could instruct the executor to surrender the estate. This date is therefore usually relatively shortly after the death of the deceased and it follows that only claims that exist at that time are capable of proof.

¹² The term “spouse” includes a party to a customary marriage as contemplated in the Recognition of Customary Marriages Act 120 of 1998. See further below in this chapter.

¹³ Section 13 of the Civil Union Act 17 of 2006 equates civil marriages and civil unions. Unless the context indicates the opposite, any reference in this thesis to a civil marriage and to a husband, wife, or spouse in a civil marriage, should be understood to include a civil union and a civil union partner respectively.

provisions relating to the execution of wills are contained in the Wills Act¹⁴, as amended. This Act consolidates the rules pertaining to the execution of wills and, to some extent, deals with the devolution of an estate where the deceased left a valid will. South African law acknowledges the principle of freedom of testation, or stated otherwise, it does not subscribe to a legal system that provides for a legitimate share or forced heirship.¹⁵ Freedom of testation means that any natural person with testamentary capacity¹⁶ may make a will and leave his or her assets to whomever he or she wishes.¹⁷ The administration of a testate estate is therefore dealt with according to the testator's free will, as expressed in his or her valid will.¹⁸ This testamentary freedom is however not absolute and is subject to certain limitations imposed by common law and statute, as interpreted and applied within South Africa's democratic constitutional framework.¹⁹ Some of these limitations or exclusions apply to the person who wrote out the will and the person who acted as witness to the will, and have been legislated and form part of the Wills Act.²⁰

The Intestate Succession Act 81 of 1987 (hereinafter referred to as the "ISA") regulates the law relating to intestate succession, which is applicable when a person dies without leaving a valid will. This Act provides detailed rules for the devolution of an intestate estate and forms an integral part of the South African succession system. The rules

¹⁴ 7 of 1953.

¹⁵ Botha *et al* 289.

¹⁶ In terms of section 4 of the Wills Act, a person with testamentary capacity is any mentally capable person over the age of sixteen years.

¹⁷ Corbett, Hofmeyr & Kahn *The law of succession in South Africa* (2001) 39-40.

¹⁸ Abrie *et al* 48.

¹⁹ Du Toit "The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch law" 1999(10)2 *Stell LR* 232. On the common law limitations on freedom of testation, see *inter alia* *In re Watson* (1893) 10 SC 276; *Taylor v Pim* (1903) 24 NLR 484; *Re Estate Barrables* 1913 CPD 364; *In re Estate Maxwell* 1949 (4) SA 84 (N); *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 722 (T); *Caldwell v Erasmus* 1952 (4) SA 43 (T); *Ex parte Dineen* [1955] 4 All SA 1933 (O); *Yassen v Yassen* 1965 (1) SA 438 (N); *Casey v The Master* 1992 (4) SA 505 (N); *Pillay v Nagan* 2001 (1) SA 410 (D); *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C); *Curators ad litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2011 (1) BCLR 40 (SCA); *BoE Trust Limited (in their capacities as co-trustees of the Jean Pierre de Villiers Trust 5208/2006)* 2013 (3) SA 236 (SCA).

²⁰ For example, sections 2B, 2C and 4A, which all provide for particular scenarios where persons mentioned in the testamentary writing will be disqualified from inheriting.

relating to intestate succession are aimed at protecting the interests of the closest family members of the deceased and provide that the estate of a deceased person who dies without a will shall devolve first on the surviving spouse and/or children, before other (close) family members stand to gain from the estate.²¹

The Matrimonial Property Act 88 of 1984 deals *inter alia* with the different matrimonial property regimes and the consequences of such regimes. One aspect of particular interest in the context of deceased estates is the chapter dealing with marriages subject to the accrual system.²² The accrual system applies to a marriage out of community of property and is broadly aimed at ensuring that the growth in the spouses' respective estates during the marriage is equalised. Where the accrual system applies to a marriage, there are specific provisions that apply when the marriage is dissolved, either by divorce or by the death of one or both spouses. The spouse (or his or her estate if he or she is deceased) whose estate shows no accrual (growth), or a smaller accrual than the estate of the other spouse, acquires a claim against the other spouse (or his or her estate if he or she is deceased) for an amount equal to half of the difference between the accrual of the respective estates of the spouses.²³ In essence, the accrual of the estate is the amount by which the net value of the estate at the dissolution of the marriage exceeds the net value of the estate at the commencement of the marriage.²⁴ There are specific provisions that allow for certain assets to be excluded from the accrual, and also for the adjustment of the commencement value to take account of the difference that may exist in the value of money due to inflation.²⁵ These provisions do not have any direct bearing on the topic of this thesis and will therefore not be discussed. Although this Act does not deal with the devolution of a deceased person's estate, it is of importance to the executor as he or she will have to deal with the accrual claim, whether as an asset in the estate of the deceased spouse or as a claim against the

²¹ Section 1.

²² Chapter I.

²³ Section 3.

²⁴ Section 4(1)(a).

²⁵ Sections 4(1)(b) and 5.

estate. The extent of the claim could therefore have an indirect impact on the devolution of the deceased estate, as the executor may be forced to sell assets to generate sufficient cash to settle the claim or may be forced to transfer an asset to the spouse in settlement of the claim.

The Estate Duty Act 45 of 1955 (hereinafter referred to as the “EDA”) as amended, provides for the imposition of estate duty on the estate of a deceased person. It contains no guidelines on the actual devolution of the estate, but has an indirect impact on the devolution, as the executor has to settle the estate duty before he or she can distribute the assets of the estate as provided for in the deceased’s will or in terms of the rules pertaining to intestate estates.

The Maintenance of Surviving Spouses Act 27 of 1990 (hereinafter referred to as the “MSSA”) provides the framework for a survivor²⁶ to lodge a claim for maintenance against the estate of the deceased spouse under certain circumstances.²⁷ The MSSA provides that the survivor of a marriage dissolved by death after 1 July 1990²⁸ has a claim for maintenance against the estate of his or her deceased spouse.²⁹ The MSSA forms the crux of this research and the problems associated with the application of the provisions thereof will be discussed under the next heading.

1.2 Problem statement

In terms of the MSSA, the survivor can lodge a claim for maintenance for the period until his or her death or remarriage, but the claim is only allowed to the extent that it is

²⁶ See 4.3.5 for an explanation of the term “survivor”. As indicated in fn 2, I use the terms “survivor” and “surviving spouse” interchangeably in this thesis.

²⁷ See preamble to the MSSA.

²⁸ This is the date on which the MSSA came into operation.

²⁹ Section 2(1).

for the survivor's reasonable maintenance needs in so far as he or she is not able to provide for those needs from his or her own means and earnings.³⁰

The MSSA includes a definition of "own means"³¹ which provides the executor with guidelines, but it does not define "maintenance" or what is meant by "reasonable maintenance". It does provide that when determining the survivor's reasonable maintenance needs, the following factors are taken into account: the amount available for distribution to heirs in the deceased's estate; the survivor's existing and expected means, earning capacity, financial needs and obligations; the duration of the marriage; the survivor's standard of living during the subsistence of the marriage; the survivor's age at the time of the deceased's death, and any other relevant factor.³²

The rationale and objectives of the MSSA³³ are valid as they seek to ensure that the survivor of a marriage dissolved by death is not left destitute without the means to meet his or her reasonable maintenance needs. The problem, however, is that it does not provide the executor with the necessary guidelines to consider the claim and to determine if the claim is reasonable. It also does not provide the necessary mechanism for the effective settlement of the claim once accepted by the executor. Both these aspects make the practical implementation of the MSSA problematic. In addition, our courts have not extended the application of the MSSA to all relationships.

³⁰ Section 2(1).

³¹ See 4.3.4 for a detailed discussion.

³² Section 3.

³³ See 4.2 for more details.

1.2.1 Considering the maintenance claim by the survivor to determine whether it is reasonable

One of the invariable consequences of a valid marriage is the reciprocal duty of support between spouses.³⁴ When a marriage ends, this duty of support comes to an end.³⁵ If the marriage ends in divorce, a new duty of support may arise,³⁶ but only by agreement between the parties or by way of the court's involvement. If the parties agree amongst themselves as to maintenance, this creates a contractual duty of support between them and the court may make an order in accordance with such agreement.³⁷ If the parties do not enter into such an agreement or the court does not deem it fit to make an order in accordance with an agreement entered into by them, the court itself may make a maintenance order.³⁸ Where the marriage ends in death, the responsibility to make a maintenance order is removed from the court and placed on the executor,³⁹ who is not as qualified as the court to decide on what could probably be regarded as a legal question.

The MSSA provides that certain factors shall be taken into consideration when determining the reasonable maintenance needs of the survivor,⁴⁰ but no guidelines are given to the executor as to how to apply these factors, the weighting (if any) to apply to them or the order of preference (if any) of such factors. The executor usually has limited information on the deceased and his or her lifestyle or standard of living, which makes it difficult to determine whether the survivor's maintenance needs and requirements are reasonable. The Estates Act gives the executor a mechanism to deal with disputed

³⁴ *Oberholzer v Oberholzer* 1947 (3) SA 294 (O); *Crouse v Crouse* 1954 (2) SA 642 (O); *Reyneke v Reyneke* 1990 (3) SA 927 (E).

³⁵ Heaton *South African family law* (2010) 151.

³⁶ Heaton 151.

³⁷ Section 7(1) of the Divorce Act 70 of 1979.

³⁸ Section 7(2) of the Divorce Act.

³⁹ Section 2 of the MSSA.

⁴⁰ Section 3 of the MSSA.

claims⁴¹ by allowing for the examination of the claim before the Master or a magistrate. It is not clear whether the executor can avail him- or herself of this option while he or she is still in the initial process of obtaining adequate information to consider the claim in order to accept or dispute it. Even if this remedy is available at that early stage of considering the maintenance claim, it appears that this option is rarely exercised. I was employed by the Master of the High Court for eleven years and was involved in the administration of estates for a further eleven years but, during that time, I did not encounter any estate with a maintenance claim by the survivor where the executor chose this route or where the Master suggested it as an option.

The executor is legally vested with the administration of the deceased's estate.⁴² As Meyerowitz⁴³ states, the executor represents neither the heirs, nor the creditors of the estate. He or she must therefore at all times act objectively and without favouring one party over another. When dealing with a maintenance claim against an estate, the executor is expected to make a decision regarding the reasonable maintenance needs of the survivor.⁴⁴ As the maintenance claim will have an impact on the balance of assets available in the estate to distribute to the heirs, it is highly probable that the claimant and heirs will have opposing interests. It is therefore almost inevitable that one of the parties will feel aggrieved by the executor's decision and bring into question the executor's objectivity. Informal discussions with estates officers and my own observations⁴⁵ indicate that maintenance claims are more often than not brought where the residual heirs are the children of the deceased and the survivor is not the biological parent of those heirs. It is therefore conceivable that the heirs might be unhappy if the executor accepts the survivor's claim as it reduces the amount available for distribution to them. Similarly, if the executor rejects the survivor's claim for being unreasonable, the survivor could be aggrieved.

⁴¹ Section 32 of the Estates Act.

⁴² *Malcomess v Kuhn* 1915 CPD 852; *Clarkson v Gelb* [1981] 1 All SA 93 (W).

⁴³ 12.20.

⁴⁴ Section 3 of the MSSA.

⁴⁵ See above regarding experience in the administration of deceased estates.

The executor is placed in a position where he or she must decide whether the survivor's needs, as claimed, are in fact reasonable. The reference to "reasonable" needs implies that the decision cannot be a purely objective one as reasonableness to some extent depends on the viewpoint of the person making the decision. The executor, for example, must decide whether expenses for items such as hairdressing, cell phone contracts, internet connection, entertainment, sport, domestic workers and food are to be regarded as reasonable. It is my submission that few executors are equipped to make such decisions. The Law Commission (now the Law Reform Commission) in its review of the law of succession⁴⁶ concluded that any factors necessitating a moral decision should be avoided when dealing with the issue of maintenance of the spouse, as the question should not be whether the surviving spouse has a moral right to share in the estate of the first-dying spouse, but rather whether he or she has a need for support.⁴⁷ I submit that, by placing the executor in a position where he or she has to decide on the reasonableness of the survivor's claim, the executor is to some extent forced to make a moral judgement.

Once the executor has determined that the survivor is in need of maintenance, he or she must determine whether the amount claimed by the survivor is reasonable. In order to correctly calculate the claim taking into account inflation⁴⁸ and mortality tables,⁴⁹ the survivor usually has to engage the services of an attorney and/or actuary, which can be

⁴⁶ South African Law Commission *Working Paper 13 Review of the law of succession: the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse* Project 22 Pretoria, 1986.

⁴⁷ At 28.

⁴⁸ Inflation is defined as "a general increase in prices" (*Oxford dictionary of current English* 2006) or the rate at which the general level of prices for goods and services is rising and, subsequently, purchasing power is falling. See also Mohr *Economic indicators* (2014) 99; Roux *Everyone's guide to the South African economy* (2014) 68; Pass, Lowe & Davies: *Unwin Hyman dictionary of economics* (1993) 256-257; <http://www.investopedia.com/terms/i/inflation.asp> (last accessed 17 May 2014).

⁴⁹ Mortality tables show the rate of deaths occurring in a defined population during a specific time interval, or the survival from birth to any given age. They show the probability of a person's death before his or her next birthday, based on his or her age. They are also commonly referred to as "life tables", "actuarial tables" or "morbidity tables": see *West's encyclopedia of American law*, 2 ed (2008); *Collins English dictionary – complete and unabridged* 12 ed (2014); <https://www.investopedia.com/terms/m/mortality-table.asp> (last accessed 17 May 2014); <https://merriam-webster.com/dictionary/mortality%20table> (last accessed 17 September 2019).

costly. Due to the technical nature of the claim, the executor is often not equipped to do the necessary calculations or even check whether the calculation is correct, which could result in delays in considering the claim or acceptance of an incorrect claim.

1.2.2 Payment of interim maintenance until the claim is accepted

There is no provision in the MSSA for payment of maintenance in the period between the spouse's death and the executor's acceptance of the maintenance claim. Considering the comments in the previous section, it appears that the acceptance of a claim usually takes at least a few months, which could potentially mean that the survivor is without means during that period.

1.2.3 Settlement of the claim

If the executor accepts the claim as being reasonable, the nature of the assets often does not allow for quick and easy settlement of the claim. The following real-life example illustrates this: The will of Mr X provides that his immovable property devolves on his surviving spouse, Mrs Y, subject to the condition that it will devolve on his daughters when Mrs Y dies. (The daughters are not the children of Mrs Y.) Should Mrs Y sell the property during her lifetime, the proceeds will devolve on the daughters at the time of the sale. The will further provides that the residue of the estate devolves on the said daughters. On the face of it, there seems to be no problem. Mrs Y, however, institutes a maintenance claim against the estate as she has hardly any assets of her own and claims that she cannot maintain the property and herself. The executor accepts her claim as being reasonable. The problem arises when the executor has to settle the claim. The residue of the estate comprises of some movable assets and very little cash, resulting in insufficient cash and/or assets to settle Mrs Y's maintenance claim. Neither the daughters (as residual heirs) nor Mrs Y is willing or able to enter into an agreement and the executor is therefore forced to sell the only realisable asset, being the

immovable property, in order to generate sufficient cash to settle the maintenance claim. The net proceeds of the property, after payment of the claim, devolves on the residual heirs (the daughters). The result is that Mrs Y receives sufficient funds to maintain herself, but she no longer has a roof over her head and the daughters' hope of receiving the property after the Mrs Y's death will no longer materialise.

If the survivor or the residual heir is unhappy with the claim as accepted by the executor, their only option is to lodge an objection with the Master.⁵⁰ This process is often unsatisfactory and lengthy, as the Master needs to ensure that all parties are given ample opportunity to represent their case.⁵¹ The process often takes months, and often results in the Master deciding that the matter is a factual dispute on which he or she cannot rule.⁵² The aggrieved party's only option then is to proceed to court for an order setting aside the executor's decision. The court may then make such order as it deems fit.⁵³ By this time, many months may have passed since the death of the deceased, with no maintenance having been paid to the survivor in the interim period, which will inevitably impact on the survivor's ability to maintain him- or herself. Furthermore, a survivor who truly cannot maintain him- or herself will in all probability not have funds to approach the court.

1.2.4 The lack of a mechanism to deal with the remaining funds on the death or remarriage of the survivor

Although the MSSA provides that the claim is for reasonable maintenance needs until the death or remarriage of the survivor,⁵⁴ it is in most instances impossible to anticipate remarriage and, in practice, the claim is therefore always calculated over the life

⁵⁰ Section 35(7) of the Estates Act.

⁵¹ Subsections (8) and (9).

⁵² *Broodryk v Die Meester* 1991 (4) SA 365 (O); *Jewaskewitz v Master of the High Court Polekwane* (sic) unreported, case number 53514/2012 [2013] ZAGPPHC 118, judgment delivered on 16 May 2013.

⁵³ Section 35(10).

⁵⁴ Section 2(1).

expectancy of the claimant.⁵⁵ There is no mechanism to address the situation where death happens earlier than anticipated or where the survivor remarries. If the survivor dies before the date regarded as the end of his or her life expectancy as per the mortality tables, the remaining portion of the funds (if any) will form part of his or her estate and will devolve on his or her testate or intestate heirs, who might be persons other than the heirs of the first-dying spouse. If the survivor remarries, any remaining portion of the funds will potentially benefit his or her new spouse. In both instances, the heirs of the first-dying spouse are prejudiced as the funds are not utilised as intended by the MSSA.

The MSSA gives the executor the power to enter into an agreement with the claimant and heirs who have an interest in the agreement, which includes the creation of a trust,⁵⁶ but this power is seldom exercised. My experience shows that the claimant is usually not prepared to enter into such an agreement. The MSSA also allows for an agreement in terms of which the heirs or legatees of the estate agree to take over the obligation to pay maintenance to the survivor, but such an obligation may have unfavourable tax consequences for the heirs or legatee.⁵⁷ In practice therefore, the claim is almost always settled by way of a lump sum payment to the survivor or the award of an asset *in specie* with no right of recourse against the survivor in the event of remarriage, or against the deceased estate of the survivor in the event of early death. I am not convinced that this is in keeping with the objectives of the MSSA and am of the opinion that consideration should be given to the claim being addressed by way of annuity payments rather than the payment of a lump sum. In *Feldman v Oshry*⁵⁸ the court referred to the practical difficulty in making periodic payments to the survivor but did not indicate any ways to deal with this difficulty. I am of the opinion that the only practical way of doing this might be to make the creation of a trust mandatory.

⁵⁵ Mortality tables are used for this purpose.

⁵⁶ Section 2(3)(d).

⁵⁷ See 8.3.4 for more details.

⁵⁸ 2009 (6) SA 454 (KZD).

The MSSA does not provide for a reassessment of the claim where there is any significant change in the circumstances of the survivor. The residual heirs of the estate may well be prejudiced if the survivor receives a maintenance payment based on his or her situation at the time of the first-dying spouse's death, and then receives a windfall such as an inheritance or winning the lottery. On the opposite side of the coin, the survivor may be prejudiced if he or she lives longer than his or her life expectancy, resulting in insufficient funds for his or her maintenance.

1.2.5 The application of the MSSA to different relationships

The MSSA does not define "spouse" or "marriage", but it does define "survivor"⁵⁹ as being the surviving spouse in a marriage dissolved by death and includes a wife in a customary marriage which was dissolved by a civil marriage contracted by her customary marriage husband with another woman on or after 1 January 1929 but before 2 December 1988.⁶⁰

Not all intimate relationships and marriages currently enjoy complete recognition in South African law. However, some of the relationships and marriages that are not completely recognised, do enjoy protection in terms of the MSSA.⁶¹ The surviving spouse of a monogamous Muslim marriage qualifies as a survivor⁶² as does the survivor of a *de facto* polygynous Muslim marriage.⁶³ From a legal perspective, there is no constitutionally acceptable reason to distinguish between Muslim and Hindu

⁵⁹ Section 1.

⁶⁰ This definition has been effective since 20 September 2010 when section 8 of the Reform of Customary Law of Succession and Regulation of Related Matters 11 of 2009 replaced the previous definition of "the surviving spouse in a marriage dissolved by death".

⁶¹ See 5.2 and 5.3 for a detailed discussion.

⁶² See *Daniels v Campbell* 2004 (5) SA 331 (C).

⁶³ See *Hassam v Jacobs* 2009 (5) SA 572 (CC).

marriages⁶⁴ and it follows that our courts will in all likelihood afford a Hindu marriage the same recognition and protection as it does a Muslim marriage.⁶⁵

Section 2(2) of the Recognition of Customary Marriages Act 120 of 1998 (hereinafter referred to as the “RCMA”) provides that a customary marriage entered into after the commencement date of this Act,⁶⁶ which complies with the requirements of that Act, is for all purposes recognised as a marriage. This means that a surviving spouse in a customary marriage can institute a claim for maintenance in terms of the MSSA. As indicated above, a “discarded” wife of a customary marriage that is dissolved by the later civil marriage of her husband also qualifies for a maintenance claim in terms of the MSSA.

As a general rule, a life partnership between same-sex or heterosexual partners does not confer the same consequences on the partners as a legally recognised marriage.⁶⁷ Before the Civil Union Act 17 of 2006 (hereinafter referred to as the “CUA”) came into operation, same-sex life partners had no method of legalising their relationship. As a result, our courts have in the past generally been willing to extend recognition to same-sex life partnerships.⁶⁸ Since the coming into operation of the CUA, same-sex partners have the right to enter into a civil union, with the same consequences as a civil marriage.⁶⁹ In addition, the pre-CUA protection afforded to same-sex life partners remains available to same-sex life partners who do not enter into a civil union.⁷⁰ Heterosexual couples are also at liberty to enter into a civil union in terms of the CUA but, in contrast to the position that applies to same-sex couples, our courts have, to date, refused to extend all spousal benefits to heterosexual life partners who do not

⁶⁴ Heaton 237.

⁶⁵ See 5.2.4 for further discussion in this regard.

⁶⁶ 15 November 2000.

⁶⁷ Heaton 243.

⁶⁸ See, for example, *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); *Fourie v Minister of Home Affairs* [2005] 1 All SA 273 (SCA) and *Gory v Kolver* 2007 (3) BCLR 249 (CC).

⁶⁹ Section 13 of the CUA.

⁷⁰ For example, *Gory v Kolver*. See 5.3.2.1.2 for a detailed discussion of this topic and the relevant case.

marry or enter into a civil union. In *Volks v Robinson*,⁷¹ the Constitutional Court agreed with the contention that the exclusion of heterosexual life partners from the protection of the MSSA amounted to discrimination on the basis of marital status, but found that it was inappropriate to impose a duty of support on the estate of a deceased person in circumstances where the law did not during his or her lifetime place such an obligation on him or her. The court therefore refused to extend the protection of the MSSA to heterosexual life partners on the basis that such partners have the option to enter into a marriage in terms of the Marriage Act.⁷² I will attempt to show that, in contrast with some other legislation, the MSSA does not cater for marriage and marriage-like relationships in a consistent fashion.

1.3 Purpose of research

This thesis examines the MSSA by engaging in a critical analysis of its provisions and the relevant South African literature and case law. While the thesis deals with the theoretical background and development of the MSSA, the emphasis is on the practical application of the Act and it focuses on the position of the executor and the manner in which he or she deals with maintenance claims in terms of the MSSA.

The thesis includes the results of interviews with estates officers⁷³ involved in the administration of deceased estates. Ethical clearance was required and obtained for the empirical study. The purpose of the interviews was to gauge whether the MSSA provides the executor of a deceased estate with the necessary assistance and guidance to consider and decide on a maintenance claim lodged against the estate. This thesis investigates and analyses the way in which estates officers approach such maintenance claims and the practical difficulties (if any) they experience in considering and dealing with the claims. It also investigates whether there are potential alternative

⁷¹ 2005 (5) BCLR 446 (CC).

⁷² See 5.3.2.2.2 for a detailed discussion of this case.

⁷³ The terms “estates officers” and “executors” are used interchangeably in this thesis.

arrangements for the handling of a maintenance claim and considers the benefits and disadvantages of such alternative arrangements.

This research adds value to the body of knowledge available to executors on this topic as it seeks to find alternative arrangements for the handling of a maintenance claim, and/or provide practical guidelines for the executor when considering a claim. The possibilities of allowing for the claim to be heard by a court of law, or providing for a re-assessment of the claim in the event that the survivor remarries or dies or there is a significant change in his or her circumstances are researched in the thesis. I also investigate the possibility of the MSSA allowing only for periodical payments or for the imposition of a limited interest over assets in favour of the survivor if all parties agree.

I also research potential problems associated with the above suggestions, for example, the cost and time spent to approach the court, and whether each option is feasible.

1.4 Scope of research

This study focuses on the MSSA, with specific emphasis on the practical application when a survivor of a marriage (or a marriage-like relationship) that ends in death lodges a claim in terms thereof. It focuses on the position of the executor and the way in which he or she deals with maintenance claims in terms of the MSSA. The study is limited to solvent estates.

1.5 Research methodology

The research for this thesis was done by way of a combination of a literature study, empirical research and comparative research.

The research revolves mainly around a critical analysis of the MSSA, the relevant South African literature and case law about the MSSA. The literature is contained in academic textbooks and journal articles.

The thesis further includes comparative research which has the object of determining how selected foreign legal systems deal with maintenance claims by surviving spouses in order to find parallels with the position in South Africa or solutions to the practical problems faced by the South African executor. I limited the comparative research to two jurisdictions, namely New Zealand and England. New Zealand was the first common law country to give the court the discretion to intervene in the testamentary wishes of a deceased person if he or she did not make adequate provision for the maintenance and support of his or her spouse or children.⁷⁴ The country also has a history of traditional versus civil law, which offers interesting insights as there are parallels with the South African position. Although our law of succession is based more on Roman-Dutch law than English law, an investigation of the law in England offers good insight into how a first-world country deals with this issue.

I used the website⁷⁵ of The Society of Estate and Trust Practitioners (STEP), a global professional association for practitioners who specialise in family inheritance and succession planning, to access their members' directory for details of individuals in the aforementioned jurisdictions who deal with contentious estates, estate planning, family law, wills and administration of deceased estates. I also visited the website of the New Zealand Law Society⁷⁶ to obtain details of attorneys and attorney firms who specialise in estates and trusts. I also approached the Ministry of Justice as I was advised that they might be able to assist with relevant information. After identifying suitable recipients, I

⁷⁴ Peart "New Zealand report on new developments in succession law" 2010(14)2 *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> (last accessed 3 August 2013).

⁷⁵ <https://www.step.org> (last accessed 6 December 2018).

⁷⁶ <https://www.lawsociety.org.nz/> (last accessed 15 June 2014).

sent specific questions to 29 practitioners in New Zealand and 48 practitioners in England.

The research for the thesis therefore also includes an empirical element as interviews⁷⁷ were conducted with several categories of persons who are involved in the handling of surviving spouses' claims for maintenance. Informal discussions with role players in the administration of deceased estates revealed that the handling of a maintenance claim in terms of the MSSA is an area of concern and the interviews were done to obtain more insight into this aspect. Most of the interviews were done by way of an electronic questionnaire, but some were conducted by way of personal face-to-face interviews. I identified suitable interviewees by utilising the website of The Fiduciary Institute of Southern Africa (FISA)⁷⁸ to identify individuals who are involved in the administration of deceased estates. I selected estates officers, firms of attorneys, other financial services companies, and individuals who offer administration of estates as a service. The purpose of the interviews with these individuals was to gauge the impact of the MSSA on a practical level, to determine how estates officers approach such claims and to understand the practical difficulties they experience in dealing with the claims.

A second set of interviews was conducted with selected practitioners who have assisted clients with the lodging of a maintenance claim against deceased estates in order to ascertain their views on the practical obstacles the spouse faces when lodging the claim with the executor of the deceased estate. This information, together with the outcome of the interviews with estates officers, gave valuable insight in, and clues to, alternative ways to handle these maintenance claims.

I also approached the Acting Chief Master of the High Court to determine whether the Master of the High Court keeps records of MSSA claims for statistical purposes.

⁷⁷ I engaged the services of Dr Liezel Korf, an expert in the field of empirical research and drafting of questionnaires to assist me with the questions for the interviews/questionnaires for the interviews.

⁷⁸ <https://www.fisa.net.za> (last accessed 27 April 2019).

1.6 Outline of chapters

This thesis considers the role and duties of the executor and specifically the way in which he or she deals with maintenance claims in terms of the MSSA. It investigates the manner in which the common law dealt with maintenance of a surviving spouse and the position in our law before the MSSA was promulgated. It analyses the MSSA and looks at the position in South Africa relating to maintenance claims in terms thereof by discussing legislation and court rulings in this regard.

The present introductory chapter is followed by chapter 2, which considers the legal position and role of the executor, and the powers and duties of the executor. The executor is the principal role player in the process of winding up a deceased estate and fulfils his or her duties relating to the administration of the estate under the direction and supervision of the Master.⁷⁹ As one of the key functions of the executor is to consider claims against the estate,⁸⁰ and the maintenance claim is lodged against the estate, it is necessary to consider the role and duties of the executor before examining the common law treatment of maintenance of the surviving spouse or the maintenance claim in terms of the MSSA. The chapter does not aim to be an exhaustive examination of the role of the executor and only focuses on the executor's role, powers and duties as far as they are relevant to this topic.

Chapter 3 examines the history of the surviving spouse's maintenance claim and looks at the position in Roman and Roman-Dutch law. It examines how the concept of maintenance of the family evolved in South African law and focuses in particular on the treatment of maintenance after the death of the maintenance obligator. It tracks the development of this aspect of our law and looks at the background to the introduction of the MSSA.

⁷⁹ Abrie *et al* 2; Meyerowitz 1.7.

⁸⁰ See 1.1 for more details.

Chapter 4 deals with the MSSA itself and examines its framework, the practical implementation thereof and looks at the shortcomings of its provisions. It also looks at some relevant case law.

Chapter 5 examines the legal position in South Africa of relationships other than a civil marriage or civil union, with specific reference to legislation and the application of such legislation by the courts. While the discussion is general, the focus is on the topic under discussion and the chapter looks at how our courts have extended the application of the MSSA to certain relationships to the exclusion of others.

Chapter 6 deals with the applicable legislation in New Zealand and England. It outlines the provisions of the relevant legislation and investigates the manner in which the courts in those countries deal with surviving spouses' maintenance claims in the context of the relevant legislation.

Chapter 7 deals with the practical implementation of the MSSA by executors in consequence of, and as informed by, empirical research. It contains an analysis of interviews with estates officers and practitioners to determine the practical difficulties faced by these officers when dealing with maintenance claims in terms of the MSSA. It specifically deals with practical problems faced by the executor when considering a maintenance claim. It also contains interviews with practitioners who have assisted surviving spouses with the lodging of a claim against a deceased estate.

The thesis concludes in chapter 8 with a summary and suggested recommendations for the executor when dealing with claims in terms of the MSSA. It also contains a proposed amended MSSA which incorporates the suggested recommendations.

CHAPTER 2

THE ROLE AND DUTIES OF THE EXECUTOR

2.1 Introduction

When a person dies, he or she usually leaves behind assets and/or liabilities. The aggregate of such assets and liabilities forms the deceased estate of that person.⁸¹ In terms of the Estates Act, whenever a person dies in or outside the Republic of South Africa (“the Republic”) and leaves either assets or a will or document that purports to be a will, his or her death has to be reported to the nearest Master of the High Court.⁸² The purpose of this process is mainly so that an executor can be appointed to administer the estate and to deal with the assets and liabilities of the estate. Only the executor can execute this process, and the estate remains unrepresented until an executor is appointed.⁸³

The word “executor” is defined in the *Oxford dictionary of current English*⁸⁴ as “a person appointed by someone to carry out the terms of their will”. The Estates Act also contains a definition,⁸⁵ which provides that an executor is “any person who is authorised to act under letters of executorship granted or signed by the Master, or under an endorsement made under section 15”.⁸⁶ The term “letters of executorship” is defined⁸⁷ as including “any document issued or a copy of any such document duly certified by any competent public authority in any State by which any person named or designated

⁸¹ *CIR v Estate Crewe* 1943 AD 656 at 667-668.

⁸² Section 7(1).

⁸³ Section 13. Where there is a likelihood of a delay in the appointment of an executor and some urgent action is required as far as estate assets are concerned, the Master may in terms of section 12(1) appoint an interim curator to take possession and control of the deceased’s assets: see Meyerowitz 7.6. This aspect of dealing with a deceased estate falls outside the scope of this thesis and will not be discussed here.

⁸⁴ Soanes 2006.

⁸⁵ Section 1.

⁸⁶ The endorsement under section 15 refers to a scenario where the authorised executor assumes another person to act as co-executor.

⁸⁷ Section 1.

therein is authorised to act as the personal representative of any deceased person or as executor of the estate of any deceased person". While the official name of the document is "letters of executorship", I use that name and "letter of executorship" interchangeably in this thesis.

The letter of executorship is therefore the official document issued by a competent authority that authorises the executor to act on behalf of the deceased estate. In South Africa that competent authority is the Master of the High Court.⁸⁸ The Estates Act provides that the Master has jurisdiction over the estates of all deceased persons who were ordinarily resident in the Republic at the time of their death and who were not at the time of their death resident in the Republic, but owned assets in the Republic.⁸⁹

The executor is therefore indispensable in the process of dealing with the deceased estate, and his or her role requires closer examination. As this thesis deals only with a particular part of the executor's duty, namely dealing with a claim under the MSSA, this chapter does not contain a detailed discussion of the executor's role and is rather intended as a brief overview.

2.2 The executor

The role of the executor was aptly summarised in *Van der Merwe v Van der Merwe*:⁹⁰

"The executors of the estate are obliged to comply with the provisions of the Estates Act and in particular to gather the assets, liquidate them where necessary, pay the liabilities and distribute the estate in the orderly manner set forth therein."

In South African law there are two types of executors, namely an executor testamentary and an executor dative. In *Ferguson and Huckell v Langerman and Lorentz*⁹¹ the court

⁸⁸ Section 4.

⁸⁹ Section 4.

⁹⁰ 16182/2012 [2013] ZAWCHC 45 (28 February 2013) at par 21.

held that there had always been a distinction between the executor testamentary and executor dative:

“The former was in olden times a person appointed by the testator to see that the heir carried out his wishes, whilst the latter was a priest appointed by the bishop to safeguard in particular the interests of the Church, and in general those of the legatees. The testamentary executor was chosen by the deceased to represent him, whilst the executor dative was an appointee of the Church. ... As executors in early days were mostly ecclesiastics, and as the Church was deeply interested in the dispositions of the property, because it always got some gift *ad pias causas* or *pro salute animae*, it framed rules for the guidance of executors. These rules formed part of the Canon law ... The rules of the Canon law were framed in order to regulate the acts of the *Ordinarius*, and they no doubt formed the basis of the later Roman-Dutch law, but in Holland at any rate the functions of a testamentary executor developed far beyond those of Canon law. The executor of the Canon law could only pay the debts, hand over to the Church gifts made *pro salute animae*, and then place the balance in the hands of the heir for distribution. The testamentary executor under the Roman-Dutch law gradually acquired wider powers, and during the 18th century amongst other duties he had to liquidate the whole of the estate, to pay the debts, to pay out to the legatees what was due to them, and then to hand over the balance to the heir.”⁹²

In modern South African law, an executor testamentary is an executor nominated in a person’s will. The mere nomination in the will does not however give the executor any authority to act on behalf of the estate – he or she has no *locus standi* until the Master has authorised him or her to act as executor by issuing letters of executorship.⁹³ The executor therefore receives his or her mandate from the appointment by the Master and not from the nomination in the will.⁹⁴

An executor dative on the other hand, is appointed by the Master in the absence of a nomination by a person in his or her will.⁹⁵ Such an appointment could be necessitated

⁹¹ 1903 TH 221.

⁹² At 227.

⁹³ Section 13(1) Estates Act; *Brand v Volkskas Bpk* 1959 (1) SA 494 (T); Meyerowitz 8.1.

⁹⁴ *Kempman v Law Union and Rock Insurance Co Ltd* 1957 (1) SA 506 (W); *Mngadi v Ntuli* 1981 (3) SA 478 (D); Abrie *et al* 89; Meyerowitz 8.1.

⁹⁵ Section 18 Estates Act; *Fischer v Liquidators of The Union Bank* (1890-1891) 8 SC 52; *Goosen v Bosch and the Master* 1917 CPD 189 at 193; Meyerowitz 9.12; Botha *et al* 391.

by the absence of a valid will, a valid will without a clause nominating an executor, or where the executor nominated in terms of a valid will is unwilling or incapable of being appointed as executor. An executor dative will also be appointed if the appointed (sole) executor for any reason ceases to be the executor.⁹⁶ As the Master makes the appointment, it follows that an executor dative also cannot act until the Master has authorised him or her to do so.

Although the Master has slightly different requirements and a different procedure for the appointment of an executor dative,⁹⁷ the authority given to the executor dative and his or her rights and duties are generally the same as those of the executor testamentary, except insofar as the will may have given the executor testamentary certain powers. For purposes of this thesis, no distinction is made between the two types of executors and any reference to an executor includes both an executor testamentary and an executor dative.

2.3 The legal position of the executor

The Estates Act provides⁹⁸ that “no person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section fifteen, or in pursuance of a direction by a Master.” Neither the phrase “liquidate or distribute”, nor the respective words “liquidate” and “distribute” are defined in this Act. Consequently, they bear their usual grammatical meaning. The *Oxford dictionary of current English* defines⁹⁹ “liquidate” as to “sell something in order to get money” or “close a business and sell what it owns in order to pay its debts”. “Distribute” is defined¹⁰⁰ as “hand or share out

⁹⁶ Meyerowitz 9.12.

⁹⁷ Meyerowitz 8.1. Sections 18 and 23 of the Estates Act contain the details relating to the different requirements and processes, but these details are not relevant for purposes of this thesis.

⁹⁸ Section 13.

⁹⁹ At 529.

¹⁰⁰ At 259.

to a number of people". In the context of a deceased estate, it has been said¹⁰¹ that these words mean that the estate must firstly be put in order by paying the debts of the estate and thereby placing it in a position where the assets can be separated into parts and divided between the heirs, and secondly by the actual division thereof amongst the heirs. In *Suid-Afrikaanse Vroue Federasie, Transvaal v Thackwray*¹⁰² it was said that an estate is liquidated when it is made free of debts and other expenses to the extent that it is made available for the enjoyment of the heirs. This statement echoes what was decided in earlier cases¹⁰³ and has since been confirmed in *Cilliers v Kuhn*.¹⁰⁴ It therefore appears that the general understanding of the term "liquidated" in the context of a deceased estate is that the executor has the duty to obtain possession of the estate assets and to realise so much of the assets as is necessary to settle the debts of the deceased, the taxes and the costs of administering the estate. Once that has been done, the executor must settle those debts, taxes and administration costs and distribute the remainder of the cash and other assets amongst the heirs.¹⁰⁵

The executor is therefore the principal role player in the process of winding up a deceased estate. He or she fulfils the duties relating to the administration of the estate under the direction and supervision of the Master.¹⁰⁶ In *Goosen v Bosch*¹⁰⁷ the court held that the executor "holds an office *sui generis*" and that his or her position is not merely that of procurator, but as representative of the estate of the deceased testator, and he is obliged to liquidate the estate and deal with in accordance with the provisions of the will and the law.¹⁰⁸ The executor is legally tasked with the administration of the

¹⁰¹ *Cilliers v Kuhn* 1975 (3) SA 881 (NCD); *Bramwell and Lazar v Laub* 1978 (1) SA 380 (W).

¹⁰² 1968 (1) SA 168 (T).

¹⁰³ *The Heirs Hiddingh v De Villiers Denyssen* (1887) 5 SC 298 (PC) 308; *Buxmann's Executor v The Master* 1932 CPD 241.

¹⁰⁴ 1975 (3) SA 881 (NCD).

¹⁰⁵ *The Heirs Hiddingh v De Villiers Denyssen* (1887) 5 SC 298 (PC) 308; *De Wet v De Wet* 1951 (4) SA 212 (C); *Bydawell v Chapman* 1953 (3) SA 514 (A); *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 (3) SA 295 (A) 302.

¹⁰⁶ *Abrie et al* 2,81; Meyerowitz 8.1.

¹⁰⁷ 1917 CPD 189 at 193.

¹⁰⁸ *Goosen v Bosch & The Master* 1917 CPD 189; *Hughes v The Master* 1960 (1) SA 601 (C).

estate¹⁰⁹ and is the only person who may deal with the estate assets and liabilities.¹¹⁰ In Roman-Dutch law the heir stepped into the shoes of the deceased and inherited both the assets and the liabilities, which meant that, where the estate had insufficient assets to cover the estate debts, the heir became personally liable to settle the shortfall.¹¹¹ In our law the executor does not have the same duty – he or she is an office bearer and neither a universal successor to the deceased nor a representative of the latter’s heirs and creditors.¹¹² This point was made clear in *Van den Bergh v Coetzee*¹¹³ where the court dealt with the question whether the knowledge of the deceased could be imputed by operation of law to the executor of the deceased’s estate. The deceased’s executor sold property of the deceased subject to a *voetstoots* clause. It subsequently appeared that the deceased had been aware of irreparable latent defects in the property. The purchaser sought to cancel the deed of sale entered into between himself and the executor on the basis that the *voetstoots* clause was ineffective. The court held that the executor and the deceased are separate and distinct *personae* and that the acts of the deceased do not by extension become those of the executor. As a result of the distinction between the persons of the deceased and the executor, the executor is not personally responsible for the debts of the deceased estate and must therefore only look to the assets of the estate in order to settle estate debts. This also means that a debt owed by the deceased to a creditor cannot be set off by a debt owed by that creditor to the executor in his or her personal capacity.¹¹⁴

The executor acts in a representative capacity, but has no principal as he or she represents the deceased estate and not the heirs or creditors of the deceased person.¹¹⁵ However, the absence of a principal does not mean that the executor is free to deal with

¹⁰⁹ *Malcomess v Kuhn* 1915 CPD 852.

¹¹⁰ *CIR v Emary* 1961 (2) SA 621 (A); *Gross v Pentz* 1996 (4) SA 617 (A); Meyerowitz 12.20.

¹¹¹ Van der Merwe & Rowland 2; Beinart “Heir and executor” 1960 *Acta Juridica* 227.

¹¹² *Laubscher v Commercial Union Assurance Co of SA Ltd* 1976 (1) SA 908 (E); *General Electric Co (Pty) Ltd v Sharfman* 1981 (1) SA 592 (W) at 597H.

¹¹³ 2001 (4) SA 93 (T).

¹¹⁴ *Brink’s Trustee v Theron* (1885) 4 SC 25.

¹¹⁵ *Goosen v Bosch and the Master* 1917 CPD 189; *Clarkson v Gelb* 1981 (1) SA 288 (W).

the estate assets and liabilities in any way he or she pleases – the executor’s position is a fiduciary one¹¹⁶ and he or she must at all times act in good faith and in a way that adheres to relevant legislation. The fiduciary position of the executor requires that he or she acts with the degree of care and skill required of someone who manages the affairs of another¹¹⁷ and that he or she always acts impartially and in an objective manner.¹¹⁸ Where the deceased left a valid will, the executor must act in terms of the will and his or her actions are to a large extent determined by the contents of the will. If the executor wants to do anything that is not covered by the will or the Estates Act or falls outside the general rule relating to liquidation and administration of an estate as mentioned above, he or she has to approach the court for the necessary authority.¹¹⁹

The Estates Act prescribes some of the duties of the executor and contains provisions relating to the method of administration of the estate. It subjects the executor to the supervision of the Master of the High Court in certain matters.¹²⁰ Although the Master acts in a supervisory capacity, it has been held that the office of the Master is not an “upper executor”.¹²¹ The Master therefore generally does not interfere with the exercise by the executor of his or her discretion, provided he or she acts in a reasonable manner, is *bona fide* and does not do anything that appears to be unreasonable and/or unnecessary for the liquidation of the estate. The Master will therefore, as a general rule, only interfere with the executor’s actions if it is clear that the executor’s conduct is improper.¹²²

¹¹⁶ See, for example, *Lindenberg v Giess* 1957 (3) SA 31 (SWA); *De Wet v Attie Badenhorst (Edms) Bpk* 1963 (3) SA 117 (T); *S v Reynecke* 1972 (4) SA 366 (T).

¹¹⁷ *Lindenberg v Giess* 1957 (3) SA 31 (SWA).

¹¹⁸ *Reichman v Reichman* 2012 (4) SA 423 (GSJ).

¹¹⁹ *L Ferera (Private) Ltd v Vos* 1953 (3) SA 450 (A).

¹²⁰ See, for example, sections 35, 42, 47, 51 and 54.

¹²¹ *Ex parte Olivier* 1928 SWA 123.

¹²² *Ries v Estate Ries* 1912 CPD 390.

Where the actions of the executor lead to maladministration or failure to exercise the necessary degree of care and skill required of an executor, and this causes loss to the estate, the beneficiaries have an action for damages against him or her.¹²³

Where there is more than one executor, they must exercise their duties jointly and they are all equally responsible for the administration of the estate.¹²⁴ They are therefore liable for each other's acts.¹²⁵ In *Gross v Pentz*,¹²⁶ however, the then Appellate Division held that where the estate suffered a loss as a result of the negligence, fraud or theft of one or more of the executors, the co-executors would not be liable if they could show that they did exercise the necessary degree of skill and care required of them. It was also held that where an executor fraudulently concealed knowledge from his or her co-executors, such knowledge was not imputable to the estate.¹²⁷

When letters of executorship are issued to a person, that person is authorised to administer all the assets of the estate in the Republic. There is nothing in the Estates Act that limits the executor's authority to the liquidation and distribution of the South African assets only,¹²⁸ but in practice the executor will only be able to deal with assets in another country if his or her appointment has been recognised in that country.¹²⁹ In *Segal v Segal*¹³⁰ the court held that the executor's authority to collect or recover property of the deceased does not emanate from the relevant section of the Estates Act¹³¹ but rather from his office as executor. The principles of international law apply to the executor's authority and such principles provide that the granting of a "probate

¹²³ The beneficiaries' right of action to claim what is due to them only arises once the liquidation and distribution account has lain for inspection, therefore their right to claim damages against the executor can only be exercised once the liquidation and distribution account has lain for inspection: see *Clarkson v Gelb* 1981 (1) SA 288 (W).

¹²⁴ *Tabethe v Mtetwa* 1978 (1) SA 80 (D); *Price v Allied Building Society* 1979 (2) SA 262 (E).

¹²⁵ *Boyce v Bloem* 1960 (3) SA 855 (T).

¹²⁶ 1996 (4) SA 617 (A).

¹²⁷ *Price v Allied Building Society* 1979 (2) SA 262 (E).

¹²⁸ Meyerowitz 8.14.

¹²⁹ *Segal v Segal* 1979 (1) SA 503 (C); Meyerowitz 8.14.

¹³⁰ 1979 (1) SA 503 (C).

¹³¹ In this particular case, the relevant provision was section 31(2) of Act 24 of 1913.

grant of letters testamentary” (in other words, a letter of executorship as we know it) in one country gives the appointee the power to collect assets only in that country. Therefore, where the deceased left assets in a country other than South Africa, the executor has to apply to the relevant authority in that country for formal recognition.¹³² As this aspect of the executor’s role has no significant impact on the topic of this thesis, I will not discuss it. For purposes of this thesis, any reference to “executor” is therefore to an executor who has been formally recognised as such and appointed to administer the estate of a deceased person.

If the deceased was married in community of property, the executor of his or her estate is entitled to administer the entire joint estate.¹³³

2.4 The powers of the executor

From the discussion above of the role of the executor it is evident that he or she must fulfil several functions in order to effectively liquidate and distribute a deceased estate. The executor has certain rights and powers during the liquidation and administration process that enable him or her to attend to these functions. Most of these rights and powers are not legislated, but are general powers found in the common law. There are, however, also some powers that are specifically provided for in legislation.

2.4.1 General powers

2.4.1.1 Delegating authority

As the executor’s entitlement to administer a deceased estate is derived from the authority granted to him or her by the Master, the executor is prohibited from substituting a third party to act in his or her place,¹³⁴ but he or she can appoint an agent

¹³² Meyerowitz 8.14.

¹³³ *Klerck v Registrar of Deeds* 1950 (1) SA 626 (T).

¹³⁴ Section 52.

to act on his or her behalf.¹³⁵ This is done by way of a revocable power of attorney.¹³⁶ The executor would usually appoint an agent if he or she is not personally in a position to attend to the administration of the estate. In practice this often happens where the executor is a family member of the deceased and has no experience of the administration of a deceased estate. The family member executor would then typically appoint an agent who is knowledgeable in the administration process and who will do the work required to administer the deceased estate. The agent acts on behalf, and on instruction, of the executor.

2.4.1.2 Carrying on a business

If the deceased was carrying on a business at the time of his or her death, the executor may under certain circumstances have to step into his or her shoes and continue with the business. This is necessary to ensure that the business is preserved in order to transfer it to the heirs or, where the will or heirs request this, to realise the business for the best possible price. If the deceased in his or her will bequeaths the business to a legatee or heir as a going concern or specifically provides that the executor must continue with the business, the executor is obliged to deliver it as such to the heir. The executor must therefore keep the business going until he or she is in a position to deliver it to the heir.¹³⁷

2.4.1.3 Enforcing contracts

A contract entered into by a person does not necessarily automatically terminate on his or her death. Where the contract relates to the person of the deceased or his or her services or skills, for example a contract of employment, the contract obviously comes to an end with the deceased's death. Other contracts such as sale agreements,

¹³⁵ *Bramwell and Lazar v Laub* 1978 (1) SA 380 (W).

¹³⁶ *Soofie v Hajee Shah Goolam Mahomed Trust* 1985 (3) SA 322 (N).

¹³⁷ *Fakrodeen v Fakrodeen* 1972 (1) SA 178 (D).

suretyship and contracts of purchase, however, continue and are binding on the executor, who is empowered to enforce them.¹³⁸

The executor generally does not have the power to enter into contracts on behalf of the estate,¹³⁹ unless the will empowers him or her to do so or it is required as part of the liquidation of the estate.¹⁴⁰ The executor may therefore enter into an agreement of sale in respect of an estate asset if this is required to settle estate liabilities, if the will instructs him or her to do so, or if the heirs request the sale of the asset.¹⁴¹

Where the will is silent in this regard and the agreement relates to something that is not required as part of the liquidation of the estate, for example a lease agreement, the executor may not enter into the agreement and has to approach the court for authority to enter into the agreement.¹⁴² Such authority will usually be granted if the court is satisfied that the agreement is to the benefit of the estate and the heirs.¹⁴³ If the executor enters into an agreement without having been empowered to do so by the will or the court, the estate is generally not bound by the contract.

2.4.2 Powers in terms of the Estates Act

2.4.2.1 Taking custody of estate property

While this aspect of the executor's role generally forms part of his or her duties, it must be noted that the Estates Act gives the executor the power to take the necessary steps to obtain possession of estate property and books or documents which are in the possession of a third party.¹⁴⁴

¹³⁸ *General Electric v Sharfman* 1981 (1) SA 592 (W).

¹³⁹ *L Ferera (Private) Ltd v Vos* 1953 (3) SA 450 (A).

¹⁴⁰ *Major's Estate v De Jager* 1944 TPD 96. See 2.4.2.3 for a further discussion.

¹⁴¹ Section 47; *Punshi v Green* 1965 (2) SA 498 (N); *George Municipality v Freysen* 1976 (2) SA 945 (A).

¹⁴² *Amod's Executor v Registrar of Deeds* 1906 TS 90; *Ex parte Lotzof* 1944 OPD 281.

¹⁴³ *L Ferera (Private) Ltd v Vos* 1953 (3) SA 450 (A); *Ex parte Huelin's Estate* 1959 (4) 85 (C).

¹⁴⁴ Section 26(2), (3), (4).

2.4.2.2 Provision for subsistence of the deceased's family or household

The executor is usually only in a position to release estate funds to the heirs of the deceased estate after expiry of the inspection period of the liquidation and distribution account,¹⁴⁵ but the Estates Act allows him or her to do so before expiry of such period if it is deemed necessary for the subsistence of the deceased's family or his or her household, and if the Master consents thereto.¹⁴⁶ This power is particularly pertinent in the context of the surviving spouse's claim for maintenance under the MSSA. As will be seen later,¹⁴⁷ there is often a delay in the process relating to the determination and subsequent acceptance (if applicable) by the executor of the claim. During that period, the surviving spouse may be without resources and this power granted to the executor to provide for the subsistence of the deceased's family or household may be the survivor's only assistance.

2.4.2.3 Sale of estate assets

As mentioned above, the executor has the authority to sell estate assets if the will does not prohibit him or her from doing so. This power is, however, subject to the approval of the heirs in the estate or, where the heirs cannot agree on the manner and conditions of sale, the authority of the Master.¹⁴⁸

2.4.2.4 Continuing or instituting legal proceedings

If the deceased instituted legal proceedings against a third party during his or her lifetime, or if such proceedings were instituted against the deceased, the executor has to be substituted for the deceased before the proceedings can continue.¹⁴⁹ The executor also has the power to institute legal proceedings on behalf of the estate.¹⁵⁰

¹⁴⁵ Section 35(12); *Stapelberg v Schlebusch* [1968] 3 All SA 421 (O) 428; Meyerowitz 18.14.

¹⁴⁶ Section 26(1A).

¹⁴⁷ Chapters 4 and 5.

¹⁴⁸ Section 47.

¹⁴⁹ Section 55.

¹⁵⁰ *Du Toit v Vermeulen* 1972 (3) SA 848 (A); *Asmal v Asmal* 1991 (4) SA 262 (N); *Gross v Pentz* 1996 (4) SA 617 (A).

2.4.2.5 Compromising claims by and against the estate

The Estates Act provides¹⁵¹ that, where a debt does not exceed R2 000, the executor may allow the debtor to pay any reasonable part of such debt in discharge of the total debt if the debtor is unable to pay the debt in full. Furthermore, the executor may allow the debtor an extension of time (subject to the prescribed time frame relating to the framing and lodging of the liquidation and distribution account)¹⁵² in which to pay the debt. If the debt exceeds R2 000, the executor may only accept part payment of the debt in discharge of the entire debt if the will authorises him or her to do so. In the absence of such authority in the will, he or she must approach the Master for the necessary authority.¹⁵³

2.5 The duties of the executor

The executor of a deceased estate has many duties to fulfil, but in essence, his or her duty is to take possession of the assets of the estate and to clear or settle the estate debts so that the estate is left free for enjoyment by the heirs.¹⁵⁴ In *Lockhat's Estate v North British & Mercantile Insurance Co Ltd*¹⁵⁵ the Appellate Division stated that the executor's duty is to obtain possession of the deceased's assets, to realise so much of the assets as may be necessary to settle the debts of the deceased, outstanding taxes and the costs of administering the estate, and to pay the remaining money and distribute the remaining assets to the heirs in terms of the will or the rules of intestacy.

The specific duties of the executor are to be found in the common law and the Estates Act.

¹⁵¹ Section 48.

¹⁵² See section 35(1).

¹⁵³ Section 48. As Meyerowitz points out in 12.42 fn 1, the Master probably cannot refuse authority if the heirs are majors and consent to the compromise.

¹⁵⁴ *Buxmann's Executor v The Master* 1932 CPD 241.

¹⁵⁵ 1959 (3) SA 295 (A) 302.

2.5.1 Common law

2.5.1.1 Preserving estate assets

The executor is obliged to preserve the estate assets in order to transfer them to the heirs in the state that they were in at the time of the deceased's death, or to realise them for the best possible price if so instructed by the will or the heirs.¹⁵⁶

There is no clarity as to whether this obligation to preserve the assets extends to insurance of the estate assets. As Meyerowitz¹⁵⁷ points out, insurance does not preserve the assets, but rather acts as indemnity if the assets should be damaged or lost. Although there appears to be no duty on the executor to insure the estate assets, the executor will in practice be guided in this regard by the heirs to the assets.

2.5.1.2 Recovering assets of the deceased

As indicated above, only the executor has the power to deal with the estate assets. With this power comes the obligation to recover all the estate assets as soon as the executor has been appointed by the Master.¹⁵⁸ Section 26 provides that the executor shall take into his or her custody or under his or her control "all the property, books and documents in the estate" immediately after the letters of executorship have been issued.¹⁵⁹

2.5.1.3 Determining beneficiaries

One of the duties of an executor is to determine the persons to whom the estate must be distributed. This entails determining how the devolution will take place in terms of the will or intestate succession law and establishing the identity of persons who claim to be beneficiaries of the estate.

¹⁵⁶ *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 (3) SA 295 (A).

¹⁵⁷ 12.25.

¹⁵⁸ *Abrie et al* 101; Meyerowitz 12.26.

¹⁵⁹ Meyerowitz 12.2.

Meyerowitz¹⁶⁰ states that the executor must make enquiries and obtain as much information as possible about the beneficiaries. As the law does not impose any duty in this regard on the executor, he or she is free to obtain whatever information he or she requires in order to determine the beneficiaries, even if it is information that would not be legally admissible in a court of law. The executor must examine the information available to him or her, using the discretion of a reasonable person in doing so.¹⁶¹ If he or she finds as a result of the investigation that the persons who claim to be beneficiaries are indeed beneficiaries, he or she can distribute the estate accordingly.¹⁶² If any person is of the opinion that the estate was distributed incorrectly, he or she may lodge an objection with the Master. If it is established that the estate was indeed distributed incorrectly but that the executor acted properly when making the distribution, the executor or the true beneficiary can use the *condictio indebiti* to recover the relevant amounts from the person to whom the incorrect payment was made.¹⁶³ If, however, the executor made the distribution *mala fide* or negligently, he or she is liable to make good the loss to the true beneficiary.¹⁶⁴

If the deceased died without a valid will, the executor must take extra care to ensure that he or she correctly identifies the beneficiaries. It would be prudent for the executor to obtain an affidavit regarding the next-of-kin of the deceased in order to determine who the beneficiaries are. The website of the Master of the High Court¹⁶⁵ indicates that a next of kin affidavit must be completed where the deceased did not leave a valid will. I am of the opinion that the executor should also obtain such an affidavit where the will

¹⁶⁰ 12.32.

¹⁶¹ Meyerowitz 12.32.

¹⁶² *Centlivres v Board of Executors* 1915 CPD 100; *Rubinow v Friedlander* 1953 (1) SA 6 (C).

¹⁶³ Section 50(b); *Laing v Le Roux* 1921 CPD 745.

¹⁶⁴ Meyerowitz 12.32; *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA); *Pretorius v McCallum* 2002 (2) SA 423 (C); Cloete "Guard against disappointed beneficiaries: the will-drafting duties of legal practitioners" 2003-3 TSAR 541. Although these cases and the article did not deal with the duty of an executor, they established the principle that a disappointed beneficiary has a delictual action for loss against a person who had a duty of care towards him and I believe that an executor will also fall under this principle.

¹⁶⁵ http://www.justice.gov.za/master/m_deceased/deceased_how.html (last accessed 17 November 2014).

does not clearly identify the beneficiaries, for example they are not mentioned by name, but rather as a class. A typical example would be “I bequeath the residue of my estate to my brothers and sisters who are alive at the time of my death”.

If an affidavit is not obtained and it later transpires that the distribution was done incorrectly, the executor will probably be regarded as having acted negligently and will therefore be liable to make good the loss to the true beneficiary.¹⁶⁶ It is therefore crucial that the executor acts carefully and makes sure that he or she ascertains the identity of the beneficiaries.¹⁶⁷ It follows that if the executor has any suspicion that the information provided in a next of kin affidavit is incomplete or inaccurate, he or she should make further enquiries and, where applicable, obtain further affidavits in order to establish the identity of the beneficiaries.

If it appears that a beneficiary may be deceased, the executor must obtain a death certificate. If a death certificate cannot be obtained, public records must be inspected, advertisements must be placed, and/or a tracing agent must be employed in order to locate the beneficiary. If all attempts fail and there is no conclusive proof that the beneficiary is alive or deceased, the inheritance of the beneficiary must be paid into the Guardian’s Fund.¹⁶⁸ This also applies if the executor is unable to ascertain the identity or whereabouts of beneficiaries.¹⁶⁹

2.5.1.4 Advising beneficiaries

As the executor’s ultimate duty is to deliver the remainder of the estate to the beneficiaries in terms of the will or the rules of intestacy, some of the executor’s actions are subject to the instruction or consent of the beneficiaries. The executor should therefore advise any beneficiary of the estate of his or her status as beneficiary and also

¹⁶⁶ Section 50(a) of the Estates Act.

¹⁶⁷ Meyerowitz 12.32.

¹⁶⁸ Section 35(13).

¹⁶⁹ Section 43(6); *Ex parte Vafidi’s Estate* 1938 CPD 109.

of the nature of his or her inheritance.¹⁷⁰ Some of the actions of the executor in the administration of the estate require the prior consent of the heirs,¹⁷¹ but even where this is not required, it is usually advisable for the executor to consult the heirs before proceeding, to avoid any potential conflicts.

2.5.2 Estates Act

2.5.2.1 Taking custody of the estate property

As mentioned above under the discussion of the executor's powers, it is the duty of the executor to take custody of, or bring all estate assets under his or her control, so that the assets can be preserved for the benefit of the heirs or legatees.¹⁷² This duty, however, does not apply in the case of estate assets in the possession of a third party who has a right of retention or lien, or who holds the asset under contract or attachment.¹⁷³

2.5.2.2 Making an inventory of the deceased's assets

The Estates Act provides for the lodging of an inventory on two different occasions. Firstly, the surviving spouse or, if there is no spouse, the nearest relative of a deceased person must lodge an inventory of the deceased's assets with the Master within fourteen days of the person's death.¹⁷⁴ The Estates Act empowers the Master to extend this period, but in practice the Master does not insist on strict adherence to this time period and accepts delay as long as the inventory is lodged within a reasonable time.¹⁷⁵

¹⁷⁰ *Bonsma v Meaker* 1973 (4) SA 526 (R); Meyerowitz 12.33.

¹⁷¹ For example, the realisation of estate assets where it has not been prescribed by the will.

¹⁷² Section 26.

¹⁷³ Sections 26(1) and 41(2).

¹⁷⁴ Section 9.

¹⁷⁵ Meyerowitz 6.2.

The inventory must be made in the prescribed form¹⁷⁶ and must be compiled in the presence of the heirs of the estate.¹⁷⁷ As the inventory is provided shortly after the death of the deceased, it is often incomplete and does not reflect all the assets of the deceased or the accurate values of such assets. The Master uses this inventory to determine the value of the estate in order to make a decision regarding the issuing of letters of executorship.¹⁷⁸ If an executor is obliged to lodge security for the due fulfilment of his or her duties, the Master uses the value of the assets reflected in the inventory to determine the extent of the security required.¹⁷⁹

If an executor is obliged to lodge security, he or she must lodge a further inventory with the Master within 30 days of the issuing of the letters of executorship, or such longer period as the Master may allow.¹⁸⁰ The purpose of this inventory is to enable the Master to determine whether the security already provided by the executor is sufficient. In addition, should the executor at any stage during the administration process become aware of additional assets that were not reflected in the inventory, he or she must lodge an additional inventory within fourteen days of becoming aware of the assets, or such longer period as the Master allows.¹⁸¹ Once again, this requirement operates to enable the Master to determine whether the security lodged is still sufficient to cover all the assets in the estate.

2.5.2.3 Opening a bank account

As soon as the executor has received R1 000 or more, he or she is obliged to open a current account in the name of the estate and to deposit such monies and all further

¹⁷⁶ The form can be found in the Regulations issued in terms of the Estates Act.

¹⁷⁷ Section 9(1).

¹⁷⁸ If the value of the estate assets does not exceed R250 000, section 18(3) provides that the Master may dispense with the appointment of an executor and may give directions relating to the manner in which the estate shall be liquidated and distributed. The amount of R250 000 was set by Regulation 920 in Government Gazette 38238, 24 November 2014.

¹⁷⁹ Section 23.

¹⁸⁰ Section 27.

¹⁸¹ Section 27(1)(b).

monies received in the said account.¹⁸² The executor also has a limited power to invest in a savings account in the name of the estate, any surplus funds that are not immediately required to pay any of the estate debts. In addition, the executor may place surplus funds not immediately required to settle claims in an interest-bearing deposit with a bank.¹⁸³ Such a step might be required where there is bound to be a lengthy delay between receiving estate funds and being able to distribute them, as this will allow for the earning of interest on the estate funds for the benefit of the heirs.

2.5.2.4 Advertising for creditors

As soon as possible after the executor has been authorised to act, he or she must ensure that a notice is published in the Government Gazette and one or more newspapers circulating in the district in which the deceased ordinarily resided at the time of his or her death.¹⁸⁴ The purpose of the notice is to alert all persons with claims against the estate to lodge such claims with the executor within a period specified in the notice, which period may not be less than 30 days or more than three months from the date of the last publication of the notice.

Although section 29 only refers to claims against the estate, it is customary for the executor in the notice also to call on debtors of the estate to make payment of the amounts owing by them to the estate.¹⁸⁵ The purpose of including debtors in the notice is to enable the executor to determine the debts for which the estate may be liable and whether the estate is solvent.

¹⁸² Section 28.

¹⁸³ Section 28(1)(b) and (c).

¹⁸⁴ Section 29.

¹⁸⁵ Meyerowitz 12.4.

2.5.2.5 Determining the solvency of the estate

Once the advertisement period referred to above has expired, the executor must determine whether the estate is solvent,¹⁸⁶ that is, whether the assets exceed the liabilities. If it does not, a specific procedure has to be followed.¹⁸⁷ As referred to in the previous chapter, this thesis deals only with solvent estates and the process for insolvent estates will therefore not be discussed.

2.5.2.6 Examining claims

One of the executor's duties is to consider claims lodged by creditors of the estate. Section 29 provides that all claims which would be capable of proof in the case of insolvency, may be lodged against the estate.¹⁸⁸ This essentially means that any liquidated claim may be lodged. The claims that could be lodged against a deceased estate cover a wide range but are usually in respect of monies lent, services rendered, or goods sold, to the deceased. A claim could therefore be in the nature of *inter alia* a medical bill, an outstanding amount on a mortgage bond or instalment sale agreement, a claim by a former spouse in terms of a divorce order, or outstanding income tax. The claims mostly relate to an agreement to which the deceased was a party and would therefore be for a fixed amount. It is, however, also possible to lodge a claim for damages against an estate, provided the amount of the claim has been determined by a court order or agreed to in a settlement between the executor and the claimant. Quite often, the executor is faced with a claim for maintenance on behalf of the minor children of the deceased. It also happens quite frequently that a claim for maintenance under the MSSA is lodged by the surviving spouse.

If the executor disputes a claim lodged against the estate, he or she may request the claimant to provide an affidavit that sets out all the details of the claim.¹⁸⁹ If he or she

¹⁸⁶ Section 34(1).

¹⁸⁷ Section 34.

¹⁸⁸ See 2.5.2.6 for more details.

¹⁸⁹ Section 32(1)(a); Meyerowitz 12.9, 16.7.

still feels that there is insufficient information to accept the claim, he or she may request the claimant to appear before the Master or a magistrate in order to be examined under oath.¹⁹⁰ This examination may only be done with the consent of the Master.¹⁹¹ As Meyerowitz¹⁹² points out, the examination is not a trial and the Master or magistrate is not there to judge the facts, but rather to supervise and keep a record of the proceedings.

If the executor has examined the claim (either on the basis of the information provided or after an examination before the Master or magistrate) and rejects it, he or she must immediately inform the claimant and provide reasons for the rejection of the claim.¹⁹³ The claimant can then either establish his or her claim by way of court action or object to the liquidation and distribution account when it is lodged with the Master.¹⁹⁴ If the latter route is followed, it is unlikely that the Master will uphold the objection unless it is clear that the claim cannot be disputed.¹⁹⁵

An executor may face various potential conflicts of interest when considering a claim under the MSSA. Neither the Estates Act nor the MSSA has clear rules to deal with this issue.¹⁹⁶ In *Van Niekerk v Van Niekerk*¹⁹⁷ it was held that an executor, when dealing with claims against the estate, is obliged to assess all the claims' merits "on a fair consideration of all the facts and its legal merits". The court further held¹⁹⁸ that it would not be proper for the executor to reject claims against the estate unless he or she had some good reason to do so. It is doubtful whether an executor who has a conflict of interest would be able to give fair consideration to a claim.

¹⁹⁰ Section 32(1)(b).

¹⁹¹ Section 32(1)(b).

¹⁹² At 16.7.

¹⁹³ Section 33.

¹⁹⁴ See the discussion below in 2.5.2.9 on objections against the liquidation and distribution account.

¹⁹⁵ *C P Smaller (Pty) Ltd v The Master* 1977 (3) SA 159 (T).

¹⁹⁶ See 4.4.8 for more details regarding the potential conflicts of interest.

¹⁹⁷ [2011] 2 All SA 635 (KZP).

¹⁹⁸ At 150.

2.5.2.7 Drawing an account of the administration

Once the executor has ascertained the debts due by the estate, received valuations for unrealised assets, and realised sufficient assets to settle the debts and administration costs, he or she must prepare a liquidation and distribution account for lodgement with the Master.¹⁹⁹ The Estates Act prescribes the format of such account.²⁰⁰ The executor is obliged to lodge the account with the Master not later than six months after the letters of executorship were issued to him or her.²⁰¹ The Act further contains provisions relating to an extension of time to lodge the account, but I will not discuss this as this aspect is not directly relevant to this thesis.

2.5.2.8 Allowing the account to lie for inspection

In terms of the Estates Act, every liquidation and distribution account must be made available for inspection by interested parties.²⁰² The executor must place notices advising interested parties of such inspection in the Government Gazette and at least one local newspaper that circulates in the district in which the deceased ordinarily resided at the time of his or her death.²⁰³ The account must lie for inspection at the relevant Master's office where it was lodged and at the magistrate's office in the district in which the deceased was ordinarily resident, unless such district has a Master's office, in which case the account lies for inspection only at the Master's office. The inspection period must be not less than 21 days.²⁰⁴

The purpose of the inspection period is to allow any interested party to examine the account to enable him or her to object to the account if he or she feels that it is incorrect.²⁰⁵ An interested party in an estate could be an heir or creditor.

¹⁹⁹ Section 35.

²⁰⁰ Regulation 5 issued in terms of the Estates Act.

²⁰¹ Section 35(1).

²⁰² Section 35(4).

²⁰³ Section 35(5).

²⁰⁴ Section 35(4).

²⁰⁵ Section 35(7); Meyerowitz 12.12.

2.5.2.9 Dealing with objections to the liquidation and distribution account

If an interested party lodges an objection to the liquidation and distribution account, the Master will provide the executor with a copy of such objection²⁰⁶ but, in practice, the objector would usually have sent a copy of the objection directly to the executor. The executor must revert to the Master with his or her comments to the objection within fourteen days of receiving such objection.²⁰⁷ The Master will then consider the executor's comments and, should he or she feel that the objection is well founded, direct the executor to amend the account accordingly.²⁰⁸ Although section 35 does not directly refer to the situation where the Master finds the objection to be unfounded, the Master's authority to sustain an objection must clearly also extend to the authority to refuse to uphold an objection.²⁰⁹ My experience in dealing with deceased estates reflects that, in practice, the Master rarely makes a decision after having considered the executor's comments and usually refers such comments to the objector. When the objector responds, the Master would typically refer such response back to the executor for further comments. This process could continue until the Master feels that he or she has received sufficient information to make a decision.

In practice, the Master does not make a ruling when the objection is based on a factual dispute.²¹⁰ The reason for this is because the Master is a creature of statute and has been endowed with neither the proper legislative authority nor the means to determine disputed facts and deal with conflicting allegations.²¹¹ The Master cannot, for example, lead or accept oral evidence. In *Fey and Whiteford v Serfontein*²¹² the court held that the nature of the Master's office means that it is ill-equipped to determine disputed facts

²⁰⁶ Section 35(7).

²⁰⁷ Section 35(8).

²⁰⁸ Section 35(9).

²⁰⁹ This assertion is borne out by the reference in section 35(10) to the "refusal of the Master to sustain an objection".

²¹⁰ *Boon v Boon* 1947 (1) PH F73; *C P Smaller (Pty) Ltd v The Master* 1977 (3) SA 159 (T); *Broodryk v Die Meester* 1991 (4) SA 825 (C).

²¹¹ *Broodryk v Die Meester* 1991 (4) SA 825 (C); *Ferreira v Die Meester* 2001 (3) SA 365 (O); *LAWSA* vol 31 "Wills and succession" 453.

²¹² 1993 (2) SA 605 (A).

and that the recognised procedure for settling disputed facts is by trial action in a court. In *Jewaskewitz v Master of the High Court Polekwane* (sic)²¹³ the court held that the Master is not a judicial officer and it cannot be expected to consider the facts of the matter to adjudicate whether a claim for maintenance should be allowed or rejected.

Where the Master has ruled against an objection or refused to rule because the objection is based on a factual dispute, and the objector is aggrieved by the decision (or lack thereof), the objector may within 30 days from the date of the ruling or refusal apply by notice of motion to the court for an order to set aside the Master's decision or for an order upholding the objection.²¹⁴

2.5.2.10 Paying creditors and heirs

Once the inspection period has passed free from objection, the estate becomes distributable and the executor must proceed to pay the creditors of the estate and distribute the remainder of the estate amongst the heirs in the manner reflected in the liquidation and distribution account.²¹⁵ The same process applies where an objection was lodged but subsequently withdrawn,²¹⁶ an objection was not sustained and no further steps were taken by the claimant,²¹⁷ or an objection was upheld and the account redrafted and re-advertised without further objection.²¹⁸

Once payment and/or transfer of assets has taken place, the executor must provide the Master with the necessary proof thereof.²¹⁹ This could entail the lodging of receipts by the creditors and heirs, or an affidavit from the executor confirming that all payments and transfers were done. Where immovable property is involved, the executor must lodge confirmation by a conveyancing attorney that the transfer to the heir/s was done.

²¹³ Unreported, case number (53514/2012) [2013] ZAGPPHC 118, judgment delivered on 16 May 2013.

²¹⁴ Section 35(10).

²¹⁵ Section 35(12)(a).

²¹⁶ Section 35(12)(c).

²¹⁷ Section 35(12)(c).

²¹⁸ Section 35(12).

²¹⁹ Section 35(12).

If the executor for any reason cannot make payment of monies due to any person, be it an heir or creditor of the estate, he or she must pay such monies into the Guardian's Fund within two months after the estate became distributable.²²⁰ Such monies will be held in the Guardian's Fund on behalf of the person who is entitled thereto until he or she claims it.

2.6 Conclusion

The executor has a very specific role and function to fulfil in the administration of an estate. A deceased estate cannot be finalised without the involvement of an executor. The executor's powers and duties are governed by the common law, Estates Act and other relevant legislation. Although this issue has been touched upon in this chapter, the role of the executor will become more evident in the discussion in chapter 4 of the maintenance claim of a surviving spouse under the MSSA.

²²⁰ Section 35(13).

CHAPTER 3

THE HISTORICAL TREATMENT OF MAINTENANCE OF THE SURVIVING SPOUSE

3.1 Introduction

South African common law is based on Roman and Roman-Dutch law and it is accordingly necessary to consider how those legal systems dealt with the issue of maintenance of family members. The duty of maintenance or support between certain relatives was fairly well established in Roman law and even more so in Roman-Dutch law.²²¹ What was not so well established though, was whether this duty ended with the death of the person responsible for the maintenance or whether it could be transferred to his or her estate, or even his or her heirs. The discussion of Roman and Roman-Dutch law that follows is intended as a brief overview only and is not an in-depth analysis.

3.2 Roman law

3.2.1 General

Roman law recognised three potential sources of *alimenta* (maintenance), namely (a) contract, (b) legacy and (c) by operation of law.²²² Where legacy or contract was involved, the general view was that the support was granted as a result of the intention expressed by the testator or person responsible for the support.²²³ *Alimenta* as a result of the operation of law, however, took no cognisance of the wishes of the person who was subject to the duty.²²⁴ For purposes of this thesis, I will focus on *alimenta* by operation of law as it has a direct link to the provision of maintenance as legislated in

²²¹ Beinart "Liability of a deceased estate for maintenance" 1958 *Acta Juridica* 92.

²²² Beinart 1958 *Acta Juridica* 92 refers to sections in the Digest which deal with these sources of maintenance, in particular D 34.1 *De alimentis vel cibariis legatis*.

²²³ Voet *Commentarius ad Pandectas* 25.3.4 as referred to in Beinart 1958 *Acta Juridica* 93.

²²⁴ Voet 25.3.4 as referred to in Beinart 1958 *Acta Juridica* 93; Beinart "The forgotten widow: provision by a deceased estate for dependants" 1965 *Acta Juridica* 91.

the MSSA. As *alimenta* by legacy or contract refers to a voluntary or agreed award of maintenance by the maintenance grantor, I will refer to it only briefly where it is relevant to the discussion.

Voet²²⁵ states that where a person provided for *alimenta* for another person in a will or contract, it was regarded as a matter of liberality and discretion as no person was obliged to bequeath *alimenta* to another. Such legacies or provisions in a contract usually included food, clothing and a place to live.²²⁶ If the testator or contracting party did not specify an amount to provide for such items, the amount was calculated on the basis of the reasonable amount the testator would have given the recipient during his or her lifetime.²²⁷ The legacy or *alimenta* would last for the period determined in the will or contract and, in the absence of a specified period, for the lifetime of the recipient.²²⁸ It is interesting to note that the legacy or contractual provision would usually end if the circumstances of the person to whom it was granted, changed to such an extent that he or she could maintain him- or herself.²²⁹ This is in stark contrast to our modern day provisions.²³⁰

The fact that the *alimenta* would, in the absence of a specific period, last for the lifetime of the person receiving it seems to presuppose that the duty would not be extinguished upon the death of the person charged with the legacy.²³¹ That would mean that if that person had not made sufficient provision for the payment, the duty would devolve on his or her heirs,²³² unless the will of the testator who had initially imposed the obligation, contained a contrary provision.²³³

²²⁵ 34.1.3 as referred to in Beinart 1958 *Acta Juridica* 93.

²²⁶ *Digesta* 34.1.1 as referred to in Beinart 1958 *Acta Juridica* 93.

²²⁷ *Digesta* 34.1.22pr as referred to in Beinart 1958 *Acta Juridica* 93.

²²⁸ *Digesta* 34.1.14pr as referred to in Beinart 1958 *Acta Juridica* 94.

²²⁹ *Digesta* 2.15.8.10 as referred to in Beinart 1958 *Acta Juridica* 94-95.

²³⁰ See chapters 4 and 5 for a further discussion on this aspect.

²³¹ The person charged with the legacy would be the person to whom the testator had left a bequest subject to the obligation to pay *alimenta* to another person.

²³² *Digesta* 34.1.16pr as referred to in Beinart 1958 *Acta Juridica* 95

²³³ Beinart 1958 *Acta Juridica* 95.

It appears that the same principle of transmissibility of *alimenta* by legacy would apply to *alimenta* provided for in a contract.²³⁴

3.2.2 *Alimenta* by operation of law

Voet²³⁵ states that there was a big difference between *alimenta* by way of contract or legacy and *alimenta* by way of operation of law. As indicated, with the first two types of *alimenta*, a measure of liberality and discretion was included and the terms of the agreement or the intention of the testator as reflected in the will would determine the nature and details of the *alimenta*. *Alimenta* by operation of law, in contrast, arose regardless of, and sometimes even contrary to, the intention or wishes of the person who was subject to the duty.²³⁶

The duty of support imposed by law was closely linked to the concept of the Roman family. The original concept entailed that the family was a legal unit and the *paterfamilias* was its head²³⁷ and the owner of the family property.²³⁸ Any property acquired by a family member under his control became his property²³⁹ and he was the only person who had legal authority to act on behalf of the members of the family.²⁴⁰ The family concept was based on the agnatic relationship and traced exclusively through the male line.²⁴¹

²³⁴ *Digesta* 22.3.9 and Voet 25.3.18 as referred to in Beinart 1958 *Acta Juridica* 97.

²³⁵ 25.3.4 and 34.1.3.

²³⁶ Beinart 1958 *Acta Juridica* 93.

²³⁷ Gardner *Family and familia in Roman law and life* 271; Nicholas *An introduction to Roman law* (2010); Skelton & Carnelley (eds) *Family law in South Africa* (2010) 10; Van Zyl *Geskiedenis en beginsels van die Romeinse privaatreë* (1977) 81; Beinart 1958 *Acta Juridica* 98.

²³⁸ Du Plessis *Borkowski's textbook on Roman law* (2010) 110; Gardner 2, 6, 233, 271; Nicholas 65.

²³⁹ Du Plessis 113; Nicholas 66; Van Zyl *History and principles of Roman private law* (1983) 102.

²⁴⁰ Gardner 271.

²⁴¹ Du Plessis 110; Nicholas 66; Van Zyl (1977) 81.

The fact that the *paterfamilias* had power over his family meant that he could decide how and to what extent he maintained the members of his family.²⁴² The duty of support that was imposed on a *paterfamilias* was regarded as a moral obligation rather than a legal one and was therefore not legally enforceable.²⁴³ It appears, however, that a *paterfamilias* was expected to provide at least the necessary maintenance to his family.²⁴⁴

The legal status of a married woman in the family was determined by the status of her marriage. In early Roman law marriage was *cum manu* ("in the hand").²⁴⁵ The effect of a marriage *cum manu* was that the wife severed her former agnatic ties and became subject to the authority of her husband as if she was his daughter.²⁴⁶ Any property owned by the wife at the time of the marriage therefore vested in her husband.²⁴⁷ A wife had the same right to succession in her husband's estate as did the children of her husband.²⁴⁸ As a woman was regarded as a child of her husband, she automatically shared in his estate together with his children when he died intestate. If a husband therefore did not wish for his wife to benefit in such a way, he would have to expressly disinherit her in a will.²⁴⁹

In later Roman law, more or less from the time of the late Republic,²⁵⁰ free marriages became the norm.²⁵¹ A free marriage allowed the wife to retain her legal status and she remained an agnate of her original family.²⁵² She therefore did not become subject to

²⁴² Nicholas 65; Beinart 1958 *Acta Juridica* 98.

²⁴³ Corbett *The Roman law of marriage* (1998) 127; Beinart 1958 *Acta Juridica* 98.

²⁴⁴ Gardner 6.

²⁴⁵ Du Plessis 122; Gardner 209; Sinclair & Heaton *The law of marriage vol I* (1996) 183.

²⁴⁶ Corbett 108; Du Plessis 123; Gardner 209; Nicholas 82; Sinclair & Heaton 184; Skelton & Carnelley (eds) 10; Beinart 1965 *Acta Juridica* 285.

²⁴⁷ Corbett 110; Du Plessis 123; Nicholas 87; Sinclair & Heaton 184.

²⁴⁸ Corbett 111, 112; Du Plessis 207; Gardner 53, 54, 210, 233, 271; Nicholas 238.

²⁴⁹ Beinart 1965 *Acta Juridica* 285.

²⁵⁰ The Republic lasted from 527 to 27 BC.

²⁵¹ Du Plessis 123; Gardner 209; Nicholas 87; Sinclair & Heaton 184.

²⁵² Corbett 122; Du Plessis 124; Gardner 210; Sinclair & Heaton 184; Skelton & Carnelley (eds) 10; Van der Vyver & Joubert *Persone en familiereg* (1991) 458; Wessels *History of the Roman-Dutch law* (1908) 453.

her husband's authority and she retained ownership of the assets she had at the time of the marriage.²⁵³ Whatever assets she acquired during the marriage remained hers or that of her *paterfamilias*.²⁵⁴ As the wife was not regarded as part of her husband's family, her right to inherit on intestacy fell away²⁵⁵ and it was therefore conceivable that a wife could be left without means of support when the marriage came to an end if she had no assets of her own.

3.2.3 Dowry/dos

Throughout Roman legal history, the dowry was an important element of property relations between spouses.²⁵⁶

In early Roman law the granting of a dowry was general practice.²⁵⁷ It was intended as a contribution by the wife or her family to assist the husband with the household expenses.²⁵⁸ As mentioned, spouses were not legally obliged to maintain each other, but there probably was a moral and social obligation to do so²⁵⁹ and the dowry assisted the husband in doing this.²⁶⁰ While the wife was under the control of her husband, the husband acquired ownership of the dowry.²⁶¹ The wife could specifically stipulate that the dowry had to be returned to her on dissolution of the marriage but, in the absence of such stipulation, she had no further right to it.²⁶²

²⁵³ Corbett 113, 114; Du Plessis 124; Nicholas 87.

²⁵⁴ Du Plessis 123; Nicholas 87; Sinclair & Heaton 184.

²⁵⁵ Corbett 117; Nicholas 207; Beinart 1965 *Acta Juridica* 285.

²⁵⁶ Du Plessis 128.

²⁵⁷ Van Zyl (1983) 100.

²⁵⁸ Du Plessis 128; Nicholas 88; Schulz *Classical Roman law* (1950) 122; Sinclair & Heaton 184; Van Zyl (1983) 100; Wessels 463.

²⁵⁹ Corbett 127; Du Plessis 128.

²⁶⁰ Corbett 127; Du Plessis 128.

²⁶¹ Corbett 148, 155; Du Plessis 128; Nicholas 88; Sinclair & Heaton 184.

²⁶² Du Plessis 128; Nicholas 88.

It appears that in early Roman law, when *cum manu* marriages were the order of the day, divorce was not common²⁶³ and, when it did occur, it was effected by a variation of the ceremonies by which the marriage had been contracted, and this would typically include provision for the dowry to be returned to the wife.²⁶⁴ The incidence of indigent divorced spouses was therefore probably rare. With the increase of divorce in later Roman law when free marriages became more prevalent, the dowry came to serve another purpose, namely to provide the wife with some protection on the dissolution of the marriage.²⁶⁵ This was achieved by providing the wife with an action, the *actio rei uxoriae* ("action for the wife's property"), allowing her to request the return of the dowry in the event of a divorce.²⁶⁶ It appears that this action was also extended to instances where the husband predeceased the wife.²⁶⁷ This ensured that the husband, although still being the owner of the dowry, could not freely dispose of the assets composing the dowry and had to account for his management thereof.²⁶⁸ The husband's position was effectively that of a temporary steward.²⁶⁹ The dowry to be returned was, however, often subject to deductions,²⁷⁰ and there was accordingly no guarantee that the entire dowry or even a substantial portion thereof would be returned to the wife.²⁷¹

During the reign of Augustus,²⁷² further reforms were introduced to improve the position of the wife.²⁷³ The husband and wife could agree how the dowry was to be dealt with on dissolution of the marriage and the dowry would have to be dealt with

²⁶³ Du Plessis 125; Nicholas 85.

²⁶⁴ Du Plessis 125; Nicholas 85; Sinclair & Heaton 185.

²⁶⁵ *Digesta* 23 3 56 1; Corbett 148; Du Plessis 128; Nicholas 88; Schulz 122; Sinclair & Heaton 184.

²⁶⁶ *Digesta* 23 3; *Codex* 5 13 1 6; 5 18 4; Corbett 148; Du Plessis 129; Jolowicz *Historical introduction to the study of Roman law* (1972) 236; Nicholas 88; Schulz 126.

²⁶⁷ Du Plessis 129.

²⁶⁸ Corbett 179; Du Plessis 129; Nicholas 88; Sinclair & Heaton 184.

²⁶⁹ Du Plessis 129.

²⁷⁰ Du Plessis 129; Nicholas 88. Corbett 194 refers to expenses related to repairs for a house that is falling down, replanting of a ruined olive orchard, medical care for slaves, and the building of a necessary granary. It appears that the husband could also deduct amounts on account of the wife's misconduct or for children born from the marriage: see, for example, Beinart 1965 *Acta Juridica* 287 fn 13.

²⁷¹ Beinart 1965 *Acta Juridica* 287.

²⁷² 27 BC to 14 AD.

²⁷³ Du Plessis 129.

accordingly when the marriage ended.²⁷⁴ In the absence of such an agreement, the *actio rei uxoriae* was still available on divorce, but Augustus formalised the position regarding deductions and the recovery of expenses from the dowry. The husband could no longer alienate the assets comprising the dowry²⁷⁵ and, where the marriage was dissolved under circumstances that gave the woman a right to restitution, the husband was obliged to restore the specific thing, unless he had alienated it with the consent of the wife.²⁷⁶ Where the husband predeceased the wife, she could recover the dowry from her husband's heirs.²⁷⁷ The restrictions applying to a husband's power to deal with the dowry, together with the duty to return it to the wife, were aimed at giving the wife some security on dissolution of the marriage.²⁷⁸

During Justinian's reign,²⁷⁹ the moral duty of *dos* developed into a legal duty.²⁸⁰ The husband could no longer alienate any assets forming part of the dowry, even if the wife consented to it.²⁸¹ The *actio re uxoriae* was abolished and the *actio ex stipulatu* became the standard action to recover the dowry. This action applied even in the absence of an agreement between the husband and wife regarded the disposal of the dowry.²⁸² The husband's right to retain a portion of the dowry was abolished and his rights were reduced to that of usufructuary.²⁸³ The whole dowry would accordingly have to be returned to the wife when the marriage came to an end.²⁸⁴ The husband no longer had a right to make certain deductions from the dowry, but he could lodge a claim for expenses associated with it.²⁸⁵

²⁷⁴ Corbett 182.

²⁷⁵ Du Plessis 129.

²⁷⁶ Corbett 180.

²⁷⁷ Du Plessis 130.

²⁷⁸ Corbett 181; Du Plessis 130; Nicholas 88.

²⁷⁹ 527 to 565 A.D.

²⁸⁰ *Codex* 5 12 14; Jolowicz (1972) 236.

²⁸¹ Du Plessis 130; Nicholas 89.

²⁸² Du Plessis 130.

²⁸³ *Digesta* 23 5 1; *Codex* 5 12 30; Jolowicz (1972) 472.

²⁸⁴ *Codex* 8.17.12.5, 8.17.12.6; Corbett 201; Du Plessis 130; Nicholas 89; Schulz 126; Van Zyl (1983) 102.

²⁸⁵ Du Plessis 131.

The result of these reforms relating to dowry secured some level of financial protection for the wife. As Beinart²⁸⁶ points out though, the reality was that the practice of *dos* was only prevalent amongst certain levels of society who owned property, which meant that many wives were in fact left destitute when their husbands died.

3.2.4 Donatio propter nuptias

In later Roman law, during the 5th and 6th centuries, the concept of a *donatio ante nuptias* or *donatio propter nuptias* (donation or gift in anticipation or on account of marriage) was introduced.²⁸⁷ This was the converse of the *dos* and entailed a gift made by the husband to the wife in contemplation of their marriage.²⁸⁸ Its purpose was to provide for her if the marriage ended with his death or if he divorced her without justification.²⁸⁹ During Justinian's reign it was enacted that the value of the *donatio* had to be equal to the value of the dowry provided by the wife,²⁹⁰ and similar rules as to the inalienability of the property comprising the dowry were applied to the *donatio*.²⁹¹ Where the marriage was dissolved by the death of the husband, the *donatio* fell to the woman, unless there were children, in which case it would go to them and she would receive a usufruct over the relevant assets comprising the *donatio*.²⁹²

Despite these developments providing women with increased protection, a married woman's financial position was not guaranteed as a husband was still not legally obliged to provide for his widow, which meant that she was dependent on his goodwill.²⁹³ Where the husband made a will, it was of course possible that he could make his wife his heir (or at least one of his heirs), leave her a legacy or confer a right to maintenance

²⁸⁶ 1958 *Acta Juridica* 101.

²⁸⁷ *Digesta* 24.1; Corbett 206; Du Plessis 131; Nicholas 89; Sinclair & Heaton 185.

²⁸⁸ Jolowicz (1972) 472.

²⁸⁹ Corbett 206; Du Plessis 131; Nicholas 89; Wessels 463.

²⁹⁰ Justinianus *Institutiones* 2 7 3; *Codex* 5 3 20 3.

²⁹¹ Du Plessis 131; Nicholas 89.

²⁹² Corbett 209.

²⁹³ Beinart 1965 *Acta Juridica* 286.

on her. As in our modern law though, there would always be instances where a husband died intestate.²⁹⁴ Will-making appears to have been the norm for the Roman propertied classes, but the majority of Roman citizens probably died intestate.²⁹⁵ The wife's position on intestacy depended on the legal nature of the marriage. If it was *cum manu*, the wife was regarded as the husband's daughter and, together with other family members who had been in the husband's power, became *sui iuris* on his death.²⁹⁶ These persons were the *sui heredes* of the deceased and succeeded to what was rightfully theirs as a result of their relationship with the deceased.²⁹⁷ Where the marriage was not *cum manu*, the wife did not form part of the class of *sui heredes* and had no claim against her husband's estate.²⁹⁸ Her only remedy therefore lay in the return of the *dos*.²⁹⁹

Beinart states that there was some evidence that the duty of maintenance might have applied between husband and wife, but concedes that there was some doubt about this. He specifically refers to Jolowicz³⁰⁰ and Sachers³⁰¹ who doubted whether the duty extended to spouses. Justinian did, however, in the *Novellae* provide for the widow to the extent that she would receive a specific portion of her deceased husband's estate.³⁰² *Novella* 53.6 provided that the indigent widow who was married without a *dos* or antenuptial agreement providing for a donation and who received nothing from her husband's estate, would be an heir of her husband's estate.³⁰³ This *Novella* was later amended by *Novella* 117.5, which amendment had the effect that the widow would be entitled to a one quarter share of her predeceased husband's estate (subject to a limit)

²⁹⁴ Du Plessis 207.

²⁹⁵ Du Plessis 207.

²⁹⁶ Du Plessis 207; Gardner 15; Nicholas 238; Beinart 1965 *Acta Juridica* 285.

²⁹⁷ Du Plessis 207; Gardner 2, 15; Nicholas 238.

²⁹⁸ Corbett 117; Du Plessis 207; Nicholas 250.

²⁹⁹ Nicholas 250.

³⁰⁰ *Roman foundations of modern law* (1957) 205.

³⁰¹ *Festschrift Schulz* 360.

³⁰² Beinart 1965 *Acta Juridica* 288; Hahlo "The sad demise of the Family Maintenance Bill 1969" 1971(88)2 *SALJ* 201. It must be noted that this right to a specific portion of the estate also extended to the widower of a deceased woman.

³⁰³ Corbett 117; Schulz *Principles of Roman law*, translated by Wolff.

where the deceased had no more than three children. If, however, her husband had more than three children and they were his children from a previous marriage, she would receive a *per capita* share with them. If the children were born from the marriage between her and her husband, she would not receive ownership of her “share” – it would vest in the children and she would receive only a usufruct over it.³⁰⁴ It is interesting to note that *Novella* 117.5 provided that where the husband was the surviving spouse, he was not entitled to any share of his wife’s estate.³⁰⁵

According to Beinart,³⁰⁶ some writers regarded this widow’s portion as akin to a legitimate portion, although *Novella* 117.5, in which it was contained, did not call it so. He concludes, however, that although the widow’s portion shared some common characteristics with the legitimate portion, it had other features that brought it more in line with provision for *alimenta*.³⁰⁷ The duty of support in Roman law was dependent on the means and earnings of the person on whom it rested, as well as the means and earnings of those persons in whose favour the duty operated.³⁰⁸ The arrangement in the *Novella* also provided that the widow would only benefit if she was found to be needy.³⁰⁹ As need was not a requirement for the legitimate portion or for that matter, for intestate succession, it could therefore be argued that the widow’s portion was more in the nature of maintenance (*alimenta*) than a legitimate portion. Beinart is of the view that the widow’s portion went considerably further than the provision of *alimenta* from the deceased estate, and that the unclear character of the widow’s portion (being neither a legitimate portion nor *alimenta*) necessitated some limitation, which came in the form of a maximum limit to the amount the widow could receive.³¹⁰ He is, however, of the opinion that, despite this problem and others, the widow’s

³⁰⁴ *Glazer v Glazer* 1963 (4) SA 694 (A) 703; Corbett 118; Dannenbring “Die kwart van die arm weduwee” 1966(29)1 THRHR 19-20.

³⁰⁵ Beinart 1965 *Acta Juridica* 289.

³⁰⁶ 1965 *Acta Juridica* 290-291.

³⁰⁷ 1965 *Acta Juridica* 290.

³⁰⁸ *Digesta* 25.3.5.7 as quoted in Beinart 1958 *Acta Juridica* 108.

³⁰⁹ Beinart 1965 *Acta Juridica* 291.

³¹⁰ 1965 *Acta Juridica* 293.

portion in the *Novella* was designed to introduce the principles of *alimenta* by operation of law in respect of a deceased estate.³¹¹

Justinian later changed the rules relating to intestacy and introduced a new system of intestate succession in *Novellae* 118 and 127.³¹² The surviving spouse was still included as an intestate heir, regardless of the nature of the marriage, but he or she only inherited after descendants, ascendants, siblings of half-blood and other collaterals.³¹³ I would assume that, in practice, this limitation of the spouse's right to inherit meant that the surviving spouse seldom inherited anything substantial on the intestacy of his or her spouse.

Beinart³¹⁴ refers to several writers³¹⁵ on Roman law who concluded that the duty of *alimenta* was regarded as highly personal in nature and inextricably linked to the person owing the duty. It was therefore not regarded as transmissible to the heirs of that person and effectively died with him or her.³¹⁶ One reason for this was that the duty was limited to certain classes of relatives and it could never be regarded reasonable to make the heirs, who could potentially be non-relatives, liable for maintenance towards people who may be strangers to them. As Beinart explains,³¹⁷ the rule against transmissibility of the duty of support became established at a time when the heir was personally liable for the debts of the deceased. In addition, the rules of the law of succession provided for legitimate portions for certain family members and it was considered unnecessary to allow those family members who were entitled to such portions an additional claim for maintenance.³¹⁸

³¹¹ 1965 *Acta Juridica* 293.

³¹² Du Plessis 212, Nicholas 250.

³¹³ Du Plessis 212; Nicholas 251; Beinart 1965 *Acta Juridica* 288.

³¹⁴ 1958 *Acta Juridica* 99.

³¹⁵ Biondi; Donellus; Glück; Pernice; Sachers; Windscheid.

³¹⁶ 1958 *Acta Juridica* 99.

³¹⁷ 1958 *Acta Juridica* 99.

³¹⁸ Beinart 1958 *Acta Juridica* 101.

Roman law accordingly did not recognise a general principle that the duty of support would be transmitted to the estate of the person owing the duty, except in the case of extreme need of the person being maintained.³¹⁹ The term “extreme need” was not defined.³²⁰ As mentioned before,³²¹ the basis of the duty of support in Roman law was that the person was in need and unable to maintain him- or herself and it appears that “extreme need” referred to a situation where the person had nobody else who was bound and able to support him or her.³²²

3.3 Roman-Dutch law

3.3.1 General

The position in Roman-Dutch law relating to *alimenta* by legacy or contract was largely similar to that in Roman law, and several writers supported this view.³²³ Beinart³²⁴ quotes Groenewegen³²⁵ who stated in his comments on Digesta 34.1.15 “*alimentandi onus non finitur morte debitoris sed ad haeredes transmittitur*”, in other words, the duty of maintenance does not terminate on the death of the debtor, but transmits to his or her heirs on his or her death.³²⁶

3.3.2 Alimenta by operation of law

As in Roman law, the duty of support was interlinked with the institution of marriage. In early Roman-Dutch law, the wife was still regarded as a minor with her husband as her

³¹⁹ Beinart 1958 *Acta Juridica* 101.

³²⁰ Beinart 1958 *Acta Juridica* 101.

³²¹ See fn 308.

³²² See, for example, Bartolus, Gothofredus; Pothier; Surdus, Voet; Beinart 1958 *Acta Juridica* 102.

³²³ Beinart 1958 *Acta Juridica* 96 refers to Bartolus, Brunnemannus, Gloss, Surdus, Van Zutphen and Voet.

³²⁴ 1958 *Acta Juridica* 96.

³²⁵ *Tractatus de legibus abrogatis et inusitatis in Hollandia*.

³²⁶ Beinart 1958 *Acta Juridica* 96.

guardian.³²⁷ His powers extended both to her person and her property. The husband had the marital power and this allowed him full administration of the assets brought into the marriage by the wife.³²⁸

Most marriages in Western Europe were entered into in community of property which meant that the wife was usually financially dependent on her husband.³²⁹ During the eleventh century, Roman law regained its importance in Western Europe and lawyers regarded Justinian's handling of succession law in *Novellae* 53.6 and 117.5 as a special sort of intestate succession law. As Jordaan³³⁰ points out though, they overlooked the fact that the two *Novellae* were not limited to instances where a deceased died intestate, and also applied in the event of testate succession.

During the Middle Ages, Holland's marriage law was governed by the canons of the Church, but after the Reformation, marriage law became secularised.³³¹ By the end of the thirteenth century, the default matrimonial property regime was community of property and profit and loss.³³² The assets of both spouses merged into one joint estate and the husband administered it by virtue of his marital power.³³³ If the marriage was dissolved by death, the surviving spouse received one half share of the joint estate and the heirs of the deceased spouse received the other half.³³⁴ The spouses were free to alter this default regime by entering into an antenuptial contract.³³⁵ It was therefore considered unlikely that a spouse would be left destitute when his or her spouse died as he or she would retain the one half share of the joint estate or the assets provided for in

³²⁷ Wessels 451.

³²⁸ Wessels 452.

³²⁹ Wessels 454.

³³⁰ "Die eis van afhanklikes en onderhoud teen die boedel van 'n testateur as beperkende faktor op die testateur se testeervryheid" Unpublished LLD thesis, University of South Africa (1987) 98.

³³¹ Sinclair & Heaton 190; Skelton & Carnelley (eds) 12.

³³² Wessels 451.

³³³ Wessels 452.

³³⁴ Wessels 453.

³³⁵ Sinclair & Heaton 193; Wessels 453; Beinart 1958 *Acta Juridica* 105; Miller "Rights of the surviving spouse: a distinct system in Scotland and developments in England" 1980 *Acta Juridica* 53.

the antenuptial contract.³³⁶ There was accordingly no need to provide for maintenance after the death of the maintenance debtor.³³⁷ The default regime of community of property did not, however, necessarily mean that the surviving spouse was sufficiently provided for – as a result of the husband’s marital power, he was not obliged to account to his wife for any dispositions made from the joint estate, although there were some limitations on his powers in this regard.³³⁸ He could therefore effectively dispose of all or most of the joint estate during his lifetime. The law also included a principle that where the husband was the first-dying spouse, the wife could free herself from personal liability for the joint debts by renouncing her rights to the joint estate.³³⁹ This would, however, have a negative impact on the wife if she had no assets of her own, which was often the case – the only way she would have been able to have assets of her own was if her father or grandfather had made gifts to her or left her a testamentary bequest and stipulated in the deed of donation or will that the gift or benefit was excluded from the joint estate and her husband’s administration.³⁴⁰

The Political Ordinance of the states of Holland (1580) contained the rules relating to marriage.³⁴¹ Parties were given the option of choosing a matrimonial property system and could, for example, choose to exclude community of property by way of an antenuptial contract.³⁴²

Most systems under the common law where the woman did not have independence seemed to rely on the principle that a married woman was entitled to some protection

³³⁶ Sonnekus “Verlengde onderhoudsaanspraak van die langsewende gade: ‘n aanvaarbare ondergraving van beskikkingsbevoegdheid?” 1990-3 TSAR 492.

³³⁷ Boberg *The Law of persons and the family with illustrative cases* 284; Hahlo *The South African law of husband and wife* 327; Beinart 1958 *Acta Juridica* 105; Beinart 1965 *Acta Juridica* 301; Sonnekus 1990-3 TSAR 492.

³³⁸ He could, for example, not make donations to third parties without his wife’s consent: see Sinclair & Heaton 192.

³³⁹ Sinclair & Heaton 193.

³⁴⁰ Sinclair & Heaton 193.

³⁴¹ Skelton & Carnelley (eds) 12.

³⁴² Van der Vyver & Joubert 461.

when her marriage was dissolved, especially if it was as a result of the husband's death.³⁴³ If a married woman did not want to be in a dependent state, she had the option of entering into a marriage settlement with her husband at the start of the marriage.³⁴⁴ It appears that the dowry provided by the wife or her family to the husband had effectively disappeared by this time and the dowry that existed at that time was the settlement by the husband on the wife.³⁴⁵ As Beinart points out though,³⁴⁶ most spouses typically did not own much property at the time they got married, which meant that they were not really in a position to make promises. Entering into a marriage settlement at such a time was therefore not necessarily a safeguard for a spouse. Some systems provided for the widow (and to some extent, the widower) in all cases, regardless of the nature of the marriage. This was usually by way of intestate succession or by way of the compulsory dowry.³⁴⁷

It seems that there were differing views on the application of Justinian's *Novellae* 53.6 and 117.5 which provided that the wife would in certain circumstances be entitled to a share of her husband's estate on his death.³⁴⁸ Beinart mentions that some writers such as Groenewegen³⁴⁹ and Van Leeuwen³⁵⁰ took the view that the system of community of property superseded the provisions of the *Novellae* and gave sufficient protection to the surviving spouse.³⁵¹ They therefore regarded the provisions of these *Novellae* as unnecessary in intestate succession and deemed them to have been tacitly revoked.³⁵² Some jurists such as Van der Keessel³⁵³ were of the opinion that the *Novellae* had become obsolete. However, as Beinart points out, this ignored the reality that not all

³⁴³ Beinart 1965 *Acta Juridica* 294.

³⁴⁴ Sinclair & Heaton 193; Skelton & Carnelley (eds) 12; Van der Vyver & Joubert 461.

³⁴⁵ Beinart 1965 *Acta Juridica* 295.

³⁴⁶ 1965 *Acta Juridica* 295.

³⁴⁷ Wessels 463; Beinart 1965 *Acta Juridica* 295.

³⁴⁸ Beinart 1965 *Acta Juridica* 296.

³⁴⁹ *De Legibus abrogatis* ad C6.18; ad D 38 11.

³⁵⁰ *Censura Forensis* 3.15.7; Miller 1980 *Acta Juridica* 53.

³⁵¹ Jordaan Unpublished LLD thesis, University of South Africa (1987) 99.

³⁵² See Beinart 1965 *Acta Juridica* for a detailed discussion of the differing opinions by the writers.

³⁵³ *Praelectiones ad Gr* 2 30 1.

marriages were in community of property and that some were governed by antenuptial contract.³⁵⁴

Some writers³⁵⁵ took a practical approach and argued that the *Novellae* should continue to be applied because they provided for something akin to *alimenta* for the spouse where the marriage was not in community of property and one spouse was in need of maintenance after the death of the other spouse. Voet,³⁵⁶ for example, suggested that there was no legal obligation on a husband to provide for his widow in his will as the provisions of the *Novellae* protected her. Other writers³⁵⁷ were of the opinion that the widow had a claim for maintenance against her husband's estate, because his obligation during his lifetime to maintain her would pass to his heirs on his death.

According to Beinart,³⁵⁸ most of the Roman-Dutch writers³⁵⁹ dealt extensively with *alimenta*, but did not discuss what happened when the person owing the duty died. The only writer who seemed to have a clear opinion on the transmissibility of the maintenance obligation was Voet who stated that the duty generally did not pass to the heirs of the person.³⁶⁰ Despite this lack of certainty as to the transmissibility of the maintenance obligation, there seems to have been some instances where a near relative of a deceased person who received no inheritance or legacy from such deceased person, and who was not able to maintain him- or herself, could claim from the heirs of that deceased person. Beinart concludes that, despite the varied opinions, it could be accepted that *Novellae* 53.6 and 117.5 provided the basis for a more comprehensive maintenance claim against a deceased person's estate by some of his needy

³⁵⁴ 1965 *Acta Juridica* 298.

³⁵⁵ For example, Bijnkershoek *Quaestiones Juris Privati* 3.12; Van Someren *De Jure Novercarum* 10.1-2; Voet *Commentarius* 38 17 26; 23 3 10.

³⁵⁶ *Commentarius ad Pandectas* 38.17.26.

³⁵⁷ Arntzenius *Institutiones* 3 7 15; Surdus *Tractatus de Alimentis* 1 23 7-9; Van Someren 10.12; Voet 25 3 10.

³⁵⁸ 1958 *Acta Juridica* 105.

³⁵⁹ Bijnkershoek; Boel; Groenewegen; Grotius; Schorer; Van den Berg; Van der Keessel; Van Leeuwen.

³⁶⁰ *Commentarius ad Pandectas* 25.3.18.

dependants, including his widow.³⁶¹ He expressed the view that such instances were regarded as “stop gaps” only to cover certain situations and were not indicative of any general principle regarding the liability of the heir of a person to maintain those persons for whose maintenance the deceased had been liable.³⁶²

A maintenance claim, as we understand it today, against the estate of a first-dying spouse therefore did not exist in Roman-Dutch law.

3.4 The position in South Africa

3.4.1 General

The general position relating to maintenance obligations by way of legacy or contract was the same as in Roman and Roman-Dutch law, except that a deceased estate was represented by the executor and not the heir.³⁶³ The executor of the estate of a maintenance debtor would have to ensure that sufficient assets or funds were set aside in the estate to settle the legacy or maintenance commitment.³⁶⁴ The estate itself, and not the heir, would be liable to settle the maintenance. If the heir of the estate died, no part of the maintenance obligation of the deceased testator would pass to the heir's estate. A testator could, however, bequeath property in his or her will to an heir or a legatee subject to the condition that the heir or legatee was obliged to provide maintenance to another party, in which case the maintenance obligation would transmit to the estate of the deceased heir, unless the will expressly indicated differently.³⁶⁵

³⁶¹ 1958 *Acta Juridica* 100; 1965 *Acta Juridica* 292, 301.

³⁶² 1958 *Acta Juridica* 105.

³⁶³ Beinart 1958 *Acta Juridica* 97; Hahlo “The forgotten widow: provision by a deceased estate for dependants” 1965 *Acta Juridica* 309.

³⁶⁴ *De Klerk's Estate v Rowan* 1922 EDL 334; *Davis' Tutor v Estate Davis* 1925 WLD 168; *Christie v Estate Christie* 1956 (3) SA 659 (N).

³⁶⁵ Beinart 1958 *Acta Juridica* 97; Hahlo 1965 *Acta Juridica* 309.

The same would apply where a person had agreed by way of contract to maintain another person – on the death of the person who undertook the maintenance obligation, the obligation would transmit to his or her estate unless the contract in terms of which the obligation was undertaken, indicated differently.³⁶⁶

In *Vaughan v SA National Trust and Assurance Co Limited*³⁶⁷ the court confirmed this view and held that where a person supports or pays maintenance to another of his or her own accord and out of pure liberality, the duty to pay maintenance would not pass to his or her heirs, unless this was clearly his or her intention.³⁶⁸ In both instances, the debt would be treated as an ordinary debt in the estate of the person paying maintenance and rank equally with all other debts.³⁶⁹

3.4.2 Maintenance by operation of law

As in Roman and Roman-Dutch law, maintenance by operation of law in South Africa has always been closely interlinked with the legislation relating to marriages.

3.4.2.1 Marriage

With the arrival of Jan van Riebeeck in 1652 and the establishment of the first European settlement in the Cape of Good Hope, the Roman-Dutch law of marriage and divorce

³⁶⁶ *Colly v Colly's Estate* 1946 WLD 83; *Owens v Stoffberg* 1946 CPD 226; *Hughes v The Master* 1960 (1) SA 601 (C); *Ex parte Standard Bank Ltd* 1978 (3) SA 323 (R); *Kruger v Goss* 2010 (2) SA 507 (SCA). An example of such an agreement would be where spouses entered into a settlement agreement on divorce and provided for maintenance in the agreement. If the agreement was made an order of court in terms of section 7(1) of the Divorce Act, the obligation to pay maintenance would come to an end as provided for in the agreement. It appears that, in the absence of a provision in the agreement for termination, our courts favour an approach where the obligation continues after the death of the maintenance debtor: see, for example, *Odgers v De Gersigny* 2007 (2) SA 305 SCA. The estate of the maintenance debtor would therefore be liable for settlement of the claim. Where the parties did not enter into an agreement (or where there was an agreement that was not included in the divorce order), the court does not have the power to bind the maintenance debtor's estate: see *Hodges v Coubrough* 1991 (3) SA 58 (D).

³⁶⁷ 1954 (3) SA 667 (C).

³⁶⁸ At 671.

³⁶⁹ Beinart 1958 *Acta Juridica* 97.

came to South Africa³⁷⁰ and the Political Ordinance of 1580 therefore formed the basis of the South African law of marriage.³⁷¹ In the period till 1910 when the Union of South Africa was established, the respective provinces applied their own marriage laws. With the establishment of the Union, these laws continued to stay in force.³⁷² The details of these laws are not relevant for purposes of this thesis and will therefore not be discussed. There were several legislative changes after 1910, but only the ones pertaining to this thesis will be discussed.

The first relevant piece of legislation for purposes of this thesis, the Matrimonial Affairs Act,³⁷³ was introduced in 1953. It retained the default regime of community of property and profit and loss, but the wife was granted some independent legal capacity and the husband's marital power was restricted.³⁷⁴ This Act, as amended by the General Law Further Amendment Act,³⁷⁵ the Maintenance Act³⁷⁶ and the Matrimonial Affairs Amendment Act,³⁷⁷ provided that a husband could not alienate any immovable property brought into the marriage by his wife, or acquired by her during the marriage by gift or inheritance or out of her own earnings. The Matrimonial Affairs Act also gave the wife control over her own earnings and savings as she could open and operate an account with a banking institution without her husband's interference.³⁷⁸

The biggest change to the matrimonial property laws was undoubtedly the introduction in 1984 of the Matrimonial Property Act.³⁷⁹ This Act abolished the common law rule affording the husband marital power over the person and property of his wife.³⁸⁰ The

³⁷⁰ Sinclair & Heaton 193.

³⁷¹ Skelton & Carnelley (eds) 13.

³⁷² Sinclair & Heaton 195.

³⁷³ 37 of 1953.

³⁷⁴ Sinclair & Heaton 196; Skelton & Carnelley (eds) 14.

³⁷⁵ 93 of 1962.

³⁷⁶ 23 of 1963.

³⁷⁷ 13 of 1996.

³⁷⁸ Sinclair & Heaton 196.

³⁷⁹ 88 of 1984.

³⁸⁰ Section 11.

abolition of the husband's marital power meant that husband and wife in a marriage in community of property now had equal powers in respect of the administration of their joint estate.³⁸¹ The Matrimonial Property Act did, however, not apply to all marriages in South Africa. Marriages between black persons were still governed by the Black Administration Act,³⁸² which provided in section 22(6) that the civil marriage of black persons was automatically out of community of property and profit and loss and the husband retained the marital power.³⁸³ The Matrimonial Property Act also specifically provided³⁸⁴ that the abolition of the husband's marital power did not apply to marriages governed by the Black Administration Act. According to Sinclair and Heaton,³⁸⁵ this different treatment of marriages between black persons existed because the Roman-Dutch system of complete community of property was regarded as an alien concept for black persons. The Law Commission's investigations³⁸⁶ in the mid-1980's, however, revealed that community of property was more popular amongst black persons, and on 2 December 1988 the Marriage and Matrimonial Property Law Amendment Act³⁸⁷ came into operation. This Act repealed section 22(6) of the Black Administration Act and extended the provisions of the Matrimonial Property Act to civil marriages entered into by black persons. This meant that the same proprietary consequences would apply to all civil marriages entered into after the commencement of the Marriage and Matrimonial Property Law Amendment Act, regardless of the race of the parties involved.³⁸⁸

The Matrimonial Property Act also introduced a new matrimonial property regime, namely out of community with the accrual system,³⁸⁹ which effectively provided a form of deferred community of gains³⁹⁰ in the sense that the spouses share equally in the

³⁸¹ Section 14.

³⁸² 38 of 1927.

³⁸³ *Ngwenya v Smuts* 1942 WLD 234; *R v Silas* 1958 (3) SA 253 (E); *Mpushu v Mjolo* 1976 (3) SA 606 (E).

³⁸⁴ Section 25(2).

³⁸⁵ *The law of marriage (vol I)* 1996 228.

³⁸⁶ *Report on marriages and customary unions of Black persons* Project 51, Pretoria 1986.

³⁸⁷ 3 of 1988.

³⁸⁸ Sinclair & Heaton 201.

³⁸⁹ Sections 2-10.

³⁹⁰ Sinclair & Heaton 198.

growth of their respective estates on dissolution of the marriage, even though there was no joint estate during the subsistence of the marriage.³⁹¹ The introduction of the accrual system was clearly intended to provide a mechanism whereby spouses could enjoy some proprietary protection when the marriage was dissolved, even though the marriage was not in community of property. The Law Commission³⁹² explained that the premise of the legislation was the idea that where one spouse financially and otherwise contributed to the growth of the other spouses' estate, he or she should be entitled to a share in the other spouse's estate when the marriage ended. In the majority of marriages at that time, the husband was the breadwinner and the wife contributed by taking care of the household and the family. While the accrual system no doubt plays some role to compensate the spouse who contributed to the marriage without necessarily gaining a financial benefit, the mere fact that the accrual system applies to a marriage does not guarantee that there will not be a maintenance need after the death of one of the spouses. Using the scenario of the husband as breadwinner, there could be instances where his estate shows little growth, which would render any claim for accrual by his wife meaningless. There surely would also be instances where the husband's estate is insolvent at the dissolution of the marriage or where he had before the marriage placed assets in a trust, thereby effectively removing them from the application of the accrual system. Statistics provided by the Department of Justice³⁹³ in the first few years after the introduction of the accrual system showed that there was a steady increase of instances where parties had entered into marriages with an antenuptial contract that excluded the accrual system. This meant that many spouses were still in marriages with complete separation of property, which meant that the

³⁹¹ Heaton 93.

³⁹² South African Law Commission *Report pertaining to the matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married woman, and the law of succession in so far as it affects the spouses* RP 26 1982, 51.

³⁹³ The figures increased from 25.2% in the period July 1985 to June 1986 to 38.6% in the period July 1989 to June 1990. The 1986/1986 figures were provided in the Department of Justice *Annual Report 1986* at 6. The figures for 1989/1990 are quoted by Sinclair & Heaton at 199 as having been confirmed by informal data released on request by the Department of Justice.

surviving spouse on death would potentially not enjoy any protection if the deceased spouse did not include him or her in the will.

3.4.2.2 The duty of support

Having considered the background of our marriage laws, we now have to look at the consequences of marriage, focusing on the duty of support.

In terms of our law, a marriage is an agreement between two parties, based on consensus³⁹⁴ and resulting in certain obligations. One such obligation is the reciprocal duty of support in terms of which both parties to a marriage are obliged to support each other.³⁹⁵ The extent of this duty is based on each party's ability to provide the other party with the support required by him or her.³⁹⁶ In the past, the duty of support between spouses came to an end with the death of one of the spouses.³⁹⁷ The issue of maintenance of the spouse was initially not addressed directly in our law and the surviving spouse therefore did not have any claim for maintenance against the deceased spouse's estate.³⁹⁸ Although our law recognised the principle of a legitimate portion, it did not extend to the surviving spouse, because the spouse was not regarded as an intestate heir of his or her deceased spouse.³⁹⁹ In practice, therefore, I have to assume that many spouses found themselves in unfavourable financial circumstances when the marriage was dissolved by death.

³⁹⁴ Heaton 15; Skelton & Carnelley (eds) 45.

³⁹⁵ *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Oberholzer v Oberholzer* 1947 (3) SA 294 (O); *Amaneeammah v Naidoo* 1948 (3) SA 712 (D); *Edelstein v Edelstein* 1952 (3) SA 1 (A); *Rousseau v Cloete* 1952 (3) SA 703 (C); *Crouse v Crouse* 1954 (2) SA 642 (O); *Woodhead v Woodhead* 1955 (3) SA 138 (R); *Jodaiken v Jodaiken* 1978 (1) SA 784 (W); *Ex parte Standard Bank Ltd* 1978 (3) SA 323 (R); Heaton 46; Skelton & Carnelley (eds) 62; Van der Vyver & Joubert 527.

³⁹⁶ *Davis v Davis* 1939 WLD 108; *Oberholzer v Oberholzer*; *Crouse v Crouse*; *Martins v Martins* 1959 (2) PH B19 (O); *Reyneke v Reyneke* 1990 (3) SA 927 (E); *Van Rooyen Friedrich v Louw Smit* 2017 (4) SA 144 (SCA).

³⁹⁷ *Ex parte Standard Bank Ltd* 1978 (3) SA 323 (R); *Kruger v Goss* 2010 (2) SA 507 (SCA); Sonnekus "Huweliksgevolge eindig in die reël met ontbinding van die huwelik?" 2010-3 TSAR 632.

³⁹⁸ Sonnekus 1990-3 TSAR 491.

³⁹⁹ Hahlo "The case against freedom of testation" 1959(76)4 SALJ 436.

The growing demand for freedom of testation and a move away from the legitimate portion resulted in the introduction of a Bill in the Cape Legislative Assembly in 1862.⁴⁰⁰ The Bill aimed to allow a testator to disinherit any member of his or her family, to abolish the legitimate portion in favour of persons other than children or ascendants and to allow the testator to bequeath his or her entire estate to his or her spouse.⁴⁰¹ Although this Bill was not passed, it did lead to the House of Assembly appointing a Law of Inheritance Commission for the Cape to investigate the law of inheritance.⁴⁰² The Commission for the Western Districts of the Cape⁴⁰³ felt that the legitimate portion should be retained as it was essential to provide support for dependants,⁴⁰⁴ while the Commission for the Eastern Districts felt that there should be a permissive law which would enable all persons to dispose of their property as they deem fit without being obliged to leave certain portions to certain family members.⁴⁰⁵ The majority report of the Law of Inheritance Commission, however, recommended that the legitimate portion of children be retained, but that the portion of parents be abolished.⁴⁰⁶

Despite this partial support for the retention of the legitimate portion, Natal was the first province to abolish the legitimate portion by means of section 3A of Act 22 of 1863, read with section 1 of Act 7 of 1885. Freedom of testation was brought about in the Cape by the Law of Inheritance Amendment Act 26 of 1873 and the Succession Act 23 of 1874. According to Hahlo,⁴⁰⁷ the latter Act was passed under the influence of economic liberalism which was popular in England at the time. The effect of the Succession Act was to completely abolish the legitimate portion and establish complete freedom of

⁴⁰⁰ Beinart 1965 *Acta Juridica* 304.

⁴⁰¹ Beinart 1965 *Acta Juridica* 304 fn 117.

⁴⁰² Hahlo 1959(76)4 *SALJ* 443; Beinart 1965 *Acta Juridica* 305.

⁴⁰³ GK 15 of 1865: Appendix 2 to Votes and proceedings of Parliament, 1866 as quoted in Beinart 1965 *Acta Juridica* 305.

⁴⁰⁴ Sections 34 and 37.

⁴⁰⁵ Report (Eastern Districts) xiii; Beinart 1965 *Acta Juridica* 305.

⁴⁰⁶ GK 15 of 1865: Appendix 2 to Votes and proceedings of Parliament 1866.

⁴⁰⁷ 1971(88)2 *SALJ* 202.

testation.⁴⁰⁸ It is interesting to note that this Act did not mention the surviving spouse or widow and their claims and it was therefore not clear to what extent the *Novellae* that applied in Roman law, continued to apply in our law.⁴⁰⁹ The uncertainty that applied in Roman-Dutch law regarding this issue therefore continued in South African law. Certainty was achieved with the judgment in *Glazer v Glazer*⁴¹⁰ where the court held that there was nothing to indicate that the provisions of the *Novellae* had ever been observed in our law and that the practice and “conception of our law” had been inconsistent with the contents of these provisions.⁴¹¹ It held further that the enforcement of the widow’s rights was in any event not in line with the practices or tendencies prevailing at the time the legislation was passed. As a result, the court held that the *Novellae* were not part of our law.⁴¹² The court added that, even if it were assumed that the *Novellae* had indeed formed part of Roman–Dutch law, they had been abrogated by disuse.⁴¹³

After the Anglo-Boer War of 1899 to 1902, the new colonies also adopted the Cape law by way of Proclamation 28 of 1902 in Transvaal and *Vrystaatse Wetboek* 1892 and Ordinance 18 of 1905 in the Free State. Hahlo⁴¹⁴ made the interesting point that, although the legislation was enacted under the influence of economic liberalism which was prevalent in England, the influence of English law was not strong enough to persuade South Africa to follow suit when England later adopted the Inheritance (Family) Provision Act in 1938.⁴¹⁵

The abolition of the legitimate portion meant that the testator now had complete freedom to do with his or her assets as he or she pleased, even if it meant disinheriting

⁴⁰⁸ Rowland “Freedom of testation in South Africa” 1970(2) *Codicillus* 4; Hahlo 1971(88)2 *SALJ* 202; Miller 1980 *Acta Juridica* 49; Marx “n Reg op onderhoud vir die langsewende gade” 1986 *Obiter* 84-91.

⁴⁰⁹ Beinart 1965 *Acta Juridica* 306.

⁴¹⁰ 1963 (4) SA 695 (A).

⁴¹¹ At 706.

⁴¹² At 705.

⁴¹³ At 705-706.

⁴¹⁴ 1971(88)2 *SALJ* 202.

⁴¹⁵ See 6.2.1 for more details.

his or her immediate family.⁴¹⁶ As confirmed in several judgments,⁴¹⁷ the court had to give effect to any clear, unambiguous testamentary provisions in a valid will, regardless of how unreasonable the testator may have been. A surviving spouse no longer had an inherent entitlement to any of the assets of the deceased spouse's estate unless nominated as beneficiary in the will, and there was no legislation that allowed a spouse to lodge a claim for maintenance if the will did not provide for him or her, did not provide sufficiently, or if there was no will. This had the effect of removing any financial protection a spouse enjoyed after the death of his or her spouse, which could of course lead to inequitable results.

In 1934 the Succession Act⁴¹⁸ was passed, which provided that the spouse of a person who died intestate (whether fully or partially) was an intestate heir of the deceased person⁴¹⁹ and entitled to a certain portion of the intestate estate of his or her spouse. This Act provided for different scenarios, with the *quantum* of the spouse's entitlement depending on the composition of the deceased's family. If, for example, the deceased left descendants, the spouse was entitled to a child's portion.⁴²⁰ If the deceased left only ascendants or collateral relations, the spouse was entitled to a half share of the estate,⁴²¹ and if the deceased left no relatives, the spouse would take the entire estate.⁴²² These provisions must certainly have helped to secure some protection for a surviving spouse whose spouse died without a will.

The question of the transmissibility of the general duty of support to family members first came to the fore in the context of children born of unmarried parents (then, so-called "illegitimate" children). In *Kramer v Findlay's Executors*⁴²³ the court allowed

⁴¹⁶ Beinart 1965 *Acta Juridica* 306.

⁴¹⁷ *Ex parte Rogers* (1908) 18 CTR 458; *Ex parte Erasmus* 1970 (2) SA 176 (T); *Coetzee v Die Meester* 1982 (1) SA 295 (O).

⁴¹⁸ 13 of 1934.

⁴¹⁹ Section 1(1).

⁴²⁰ Section 1(1)(a) and (b).

⁴²¹ Section 1(1)(c).

⁴²² Section 1(1)(d).

⁴²³ 1878 Buch 51, 52.

monthly payments out of the estate of the deceased to the mother of the deceased's "illegitimate" child but gave no reasons to explain the order. In *Ex parte Leevenveld: In re Foot*⁴²⁴ the court did not make a direct ruling in this regard but expressed doubt as to whether the duty should be transmitted to the estate of the person who is obliged to pay maintenance. The seminal case dealing with maintenance of "illegitimate" children is *Carelse v De Vries*,⁴²⁵ which dealt with a claim brought by Ms Carelse for maintenance of her minor "illegitimate" children against their father's estate. The court referred to the fact that the authorities were apparently not in agreement as to the question whether the obligation of a father to support his children passed to his heirs. It cited Voet,⁴²⁶ who maintained that the duty ceased on the death of the parent. It also referred to Groenewegen⁴²⁷ who maintained the opposite view.⁴²⁸ The court held that where the estate of the deceased was sufficient to pay for the maintenance of "legitimate" children (that is, children born of married parents), it would be competent to award maintenance from the estate to the "illegitimate" children.⁴²⁹

Beinart⁴³⁰ points out that the court's conclusion in *Carelse* was based on an erroneous reliance on a statement by Groenewegen that *alimenta* due by a debtor is transmitted to his heirs.⁴³¹ He suggests that Groenewegen's use of the word "*debitor*" seemed to indicate that this statement was intended to relate only to a duty of support by contract or legacy and not to the maintenance obligation that arose by operation of law.⁴³²

⁴²⁴ (1885) 4 SC 64.

⁴²⁵ (1906) 23 SC 532.

⁴²⁶ *Commentarius ad Pandectas* 23.2.82.

⁴²⁷ *Tractatus de Legibus abrogatis et inusitatis in Hollandia vicinisque regionibus*.

⁴²⁸ In *Lloyd v Menzies* 1956 (2) SA 97 (N) at 160 the court specifically mentioned the conflicting views of Voet and Groenewegen.

⁴²⁹ 537-538.

⁴³⁰ 1958 *Acta Juridica* 96.

⁴³¹ Groenewegen's statement "... *alimentandi onus non finitur more debitoris sed ad haeredes transmittitur* ..." translates loosely as "the duty of maintenance does not terminate on the death of the debtor but transmits to his or her heir".

⁴³² 1958 *Acta Juridica* 96.

Beinart refers to several other decisions⁴³³ that dealt with the issue of maintenance and the transmission thereof to the debtor's estate. Some of these decisions also relied on this incorrect application of Groenewegen's statement. In *Spies' Executors v Beyers*,⁴³⁴ for example, the court referred to "the clear categorical statement of Groenewegen that the heir is liable for the maintenance of the children of the deceased".⁴³⁵ In *Ritchken's Executor v Ritchken*,⁴³⁶ the court referred to Groenewegen's statement when holding that the deceased did not have the power "to absolve his estate from its legal obligation to educate and maintain his minor offspring after his death".⁴³⁷ In *Ex parte Jacobs*,⁴³⁸ a case that was decided several years after Beinart's comments were made, the court, however, held that, while there is no question that a parent remains liable to maintain his or her major child where the child is not capable of maintaining him- or herself, this liability ceases when the parent dies, because the estate must at some stage be finalised and cannot remain open in case a child becomes needy at a later stage.⁴³⁹

Beinart expresses the opinion⁴⁴⁰ that, although the cases referred to by him were clearly based on wrong authority, their outcomes were desirable and correct in view of the then prevailing legal and social considerations. One such consideration was that the law of that time had abolished the legitimate portion applicable in Roman and Roman-Dutch law and other protection against disinheritance, which meant that it was possible that the close relatives of a deceased person could be left destitute on his or her death.⁴⁴¹ The decision to extend or transmit the maintenance claim to the estate of the debtor

⁴³³ For example, *Spies' Executors v Beyers* 1908 TS 473; *De Klerk v Rowan* 1922 EDL 334; *Ritchken's Executor v Ritchken* 1924 WLD 17; *Davis' Tutor v Estate Davis*; *Goldman v Executor Estate Goldman* 1937 WLD 64; *In re Estate Visser* 1948 (3) SA 1129 (C); *Ex parte Zietsman: in re Estate Bastard* 1952 (2) SA 16 (C); *Lloyd v Menzies* 1956 (2) SA 97 (N); *Christie v Estate Christie* 1956 (3) SA 659 (N); *Hoffmann v Herdan* 1982 (2) SA 274 (T).

⁴³⁴ 1908 TS 473.

⁴³⁵ At 481.

⁴³⁶ 1924 WLD 17.

⁴³⁷ At 24.

⁴³⁸ 1982 (2) SA 276 (O).

⁴³⁹ At 279.

⁴⁴⁰ 1958 *Acta Juridica* 106.

⁴⁴¹ 1958 *Acta Juridica* 107.

therefore offered some protection to the person who depended on the maintenance. In an article on freedom of testation, Hahlo⁴⁴² stated that “the balance of social realities” favoured a system of maintenance provision for family members over the legitimate portion. The latter system interfered with the will (where applicable) and the estate of a deceased person, as it permanently diminished the estate. Maintenance, however, usually does not impact on the estate, as the estate’s income, and not capital, is used to fund the maintenance,⁴⁴³ except where the parties agree that a lump sum be awarded to settle the maintenance obligations. His view⁴⁴⁴ was that there was no need for the re-introduction of a legitimate portion for a spouse married in community of property, as the surviving spouse would in any event be entitled to half of the estate. He did, however, feel that provision should be made for the maintenance of the surviving spouse from the other half of the estate if necessary.⁴⁴⁵ Where the marriage is out of community of property, his view was that the parties had selected this matrimonial property regime and therefore had only themselves to blame if they found themselves in need of maintenance when the marriage ended. He did, however, concede that this was an instance where the courts should be given the power to award maintenance to the surviving spouse out of the estate of the deceased spouse.⁴⁴⁶ Beinart⁴⁴⁷ also favours the family provision scheme as he was of the opinion that it was based mainly on the needs of the dependants and the size of the estate, rather than on the moral right of any person to share in the deceased person’s estate.

According to Beinart,⁴⁴⁸ the fact that, in South African law, the heir was no longer personally liable for the debts of the deceased person, as was the position in Roman law, was another reason for the courts holding that the maintenance obligation passed

⁴⁴² 1959(76)4 SALJ 445.

⁴⁴³ Hahlo 1959(76)4 SALJ 446.

⁴⁴⁴ 1959(76)4 SALJ 446.

⁴⁴⁵ 1959 *Acta Juridica* 446.

⁴⁴⁶ 1959 *Acta Juridica* 447.

⁴⁴⁷ 1965 *Acta Juridica* 318.

⁴⁴⁸ 1958 *Acta Juridica* 141.

to the estate of the deceased.⁴⁴⁹ The deceased estate was administered by an executor and it was he or she, in that capacity, and not the heir, who was liable to settle the deceased's debts out of the estate. The estate would therefore continue the duty of support on behalf of the deceased.⁴⁵⁰ Beinart refers to some cases⁴⁵¹ where the courts held that an innocent divorced spouse could claim maintenance from the guilty spouse until the death or remarriage of the innocent spouse and argued that this reinforced the view that the maintenance obligation would be transferred to the estate of the person who was obliged to pay maintenance.⁴⁵² He suggested⁴⁵³ that, as in Roman law, the maintenance should be based on the means of the deceased and the means and needs of the person claiming support.⁴⁵⁴ The obligation would cease when the person who claimed support became able to support him- or herself from own resources or where another person took on the obligation to maintain him or her.⁴⁵⁵ The maintenance claim would rank after that of other creditors.⁴⁵⁶ He mentioned that this principle was decided in several cases,⁴⁵⁷ although no reason for the decision was given in any of these cases. I am of the opinion that the reason for this principle was probably the fact that the claim was regarded as being in respect of future maintenance (that is, maintenance that only becomes due and payable after the death of the maintenance debtor) and therefore could not compete against claims for monies already owing to creditors at the time of the debtor's death.

The issue of maintenance was not restricted to spouses and children. In *Lloyd v Menzies*⁴⁵⁸ the court was asked to decide on a grandfather's obligation to provide

⁴⁴⁹ Beinart 1965 *Acta Juridica* 309.

⁴⁵⁰ Beinart 1965 *Acta Juridica* 309.

⁴⁵¹ *Colly v Colly's Estate* 1946 TPD 83; *Owens v Stoffberg* 1946 CPD 226; *Hughes v The Master* 1960 (1) SA 601 (C).

⁴⁵² 1965 *Acta Juridica* 309.

⁴⁵³ Beinart 1958 *Acta Juridica* 108.

⁴⁵⁴ Corbett 127.

⁴⁵⁵ Beinart 1958 *Acta Juridica* 108.

⁴⁵⁶ Beinart 1958 *Acta Juridica* 110.

⁴⁵⁷ *Shearer v Shearer* 1911 CPD 813; *Davis' Tutor v Estate Davis*; *In re Estate Visser* 1948 (3) SA 1129 (C); *Ex parte Zietsman: in re Estate Bastard* 1952 (2) SA 16 (C).

⁴⁵⁸ 1956 (2) SA 97 (N).

maintenance to a grandchild. The court dealt held “that it would be illogical not to maintain the liability upon the estate of anyone who, if living, is under the duty to provide support”.⁴⁵⁹ It accordingly held that the estate of the grandfather must provide maintenance for his grandchild. Not all court decisions however came to the same conclusion – in *Barnard v Miller*,⁴⁶⁰ for example, the court held that a grandparent’s deceased estate was not liable for the maintenance of his grandchildren.

Despite the fact that our courts were by the early 1960s considering the extension of the duty of support to other family relationships, the question whether the estate of a deceased spouse would be liable to maintain the surviving spouse had still not been answered. Beinart is of the view that the fact that the Matrimonial Affairs Act of 1953 permitted maintenance orders on divorce “for a fixed period or until the death or remarriage” of the spouse to be maintained,⁴⁶¹ suggests that the same principle should apply on the death of a spouse, so that the estate of the spouse who was liable for maintenance would continue to be liable.⁴⁶² He argues that it would hardly be reasonable to allow a divorced spouse to claim maintenance from the former spouse’s estate, but deny the surviving spouse a similar claim. He therefore advocates that our law should protect a surviving spouse from disinherison by allowing for a debtor spouse’s estate to be liable for maintenance if the surviving spouse could not maintain him- or herself or had no one else to support him or her, and that this obligation should endure for the duration of the surviving spouse’s life or until remarriage.⁴⁶³

The issue of maintenance between spouses and the handling thereof after the death of one of the spouses was eventually addressed by the Appellate Division in *Glazer v Glazer*.⁴⁶⁴ The applicant was the widow of Samuel Glazer who died testate and left

⁴⁵⁹ At 102.

⁴⁶⁰ 1963 (4) SA 426 (C).

⁴⁶¹ Section 10.

⁴⁶² 1958 *Acta Juridica* 111.

⁴⁶³ 1958 *Acta Juridica* 111.

⁴⁶⁴ 1963 (4) SA 694 (A).

nothing to his widow in his will (which had been executed almost five years prior to the conclusion of their marriage). The spouses had been married out of community of property and the marriage had lasted about fourteen months. Mrs Glazer brought an application for the payment of an amount of R500 per month for maintenance, but the Witwatersrand Local Division ruled against her.⁴⁶⁵ The matter was then taken on appeal. The Appellate Division compared the position of the needy widow to that of the wife whose husband's actions had led to a divorce. It held that the recognition of the guilty husband's obligation to maintain his innocent wife in a divorce scenario did not lead to the conclusion that a deceased husband's estate should be liable for maintenance of his needy widow "merely because she is indigent and without regard to other circumstances which may have influenced him in deliberately making no provision for her".⁴⁶⁶

The court referred to several cases in which it was held that a child was entitled to maintenance out of the estate of the deceased parent⁴⁶⁷ and expressed the view that, although these cases were founded on a mistaken reading of *Groenewegen*,⁴⁶⁸ it would assume that the decisions had become settled law. The court found that there was a fundamental difference between the relationship between spouses and the one between parent and child. The latter relationship was an "immutable natural relationship", whereas the relationship between spouses could be severed at any time, regardless of how close it was. Acceptance of a child's claim for maintenance therefore did not imply that the spouse's claim for maintenance should also be accepted, and the court held that denial of the spouse's claim was not an anomaly in our law.⁴⁶⁹ The court therefore refused to uphold the appeal.

⁴⁶⁵ 1962 (2) SA 548 (W).

⁴⁶⁶ At 705.

⁴⁶⁷ See fn 433.

⁴⁶⁸ See fn 431.

⁴⁶⁹ At 707.

This decision left the surviving spouse with no legal remedy if the deceased spouse chose to disinherit him or her or leave him or her no other benefits (for example proceeds from a pension fund or insurance policy). Beinart⁴⁷⁰ criticises the distinction drawn in the judgment between the position of the divorced spouse and that of the surviving spouse of a marriage ended by death, on the basis that divorce was to some extent a voluntary action during which the parties could plan to such an extent that future maintenance was provided for. He quotes with agreement from a Report issued in 1930 in the State of New York that stated:

“There is a glaring inconsistency in ... law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death.”⁴⁷¹

It is useful to note here that the Matrimonial Affairs Act provided for maintenance orders on divorce for a fixed period or until the death or remarriage of the spouse to be maintained.⁴⁷² This effectively placed the divorced spouse in a stronger position than the surviving spouse whose spouse had died, which clearly was unreasonable. Beinart suggests that it was time for legal reform of the position of the widow regarding maintenance. He refers to the growing independence of women which had led to a dilution of women’s succession rights, but argued that the law did not always translate into economic and social independence and many women were therefore still dependent on maintenance from their husbands.⁴⁷³ He, however, expresses his opposition to the reintroduction of a legitimate portion on the basis that it took little notice of the wealth of the deceased or the needs of the dependants or the beneficiaries in terms of the will.⁴⁷⁴ Hahlo⁴⁷⁵ also expresses his preference for maintenance over a legitimate portion. He quotes Laufer⁴⁷⁶ who had remarked that the

⁴⁷⁰ 1965 *Acta Juridica* 311–312.

⁴⁷¹ “Reports of the Commission to investigate defects in the laws of estates, New York” Legislative document No 69 (1930) 86.

⁴⁷² Section 10.

⁴⁷³ 1965 *Acta Juridica* 311.

⁴⁷⁴ 1965 *Acta Juridica* 314.

⁴⁷⁵ 1959(76)4 *SALJ* 446.

⁴⁷⁶ (1955)69 *Harv LR* 280.

legitimate portion system assumes a “fictitious ‘average’ surviving spouse” when applying a mathematical rule, which means that all spouses are treated alike, regardless of their circumstances.

3.4.3 Legislative reform

In 1965 there was finally some legislative progress with the publication of the Family Provision Bill.⁴⁷⁷ This Bill largely followed the Inheritance (Family Provision) Act introduced in England in 1938.⁴⁷⁸ The preamble positioned the purpose of the Bill as “to make provision for the maintenance out of the estate of a deceased person of certain members of his family...”.

The salient aspects of the Bill were as follows:

- Where a person died after the commencement of the Act (assuming the Bill translated into an Act) and left an estate in the Republic and a dependant who was ordinarily resident in the Republic, the court could, on application by such dependant, order that such reasonable provision as the court deemed fit would be made out of the deceased estate for the maintenance of that dependant.⁴⁷⁹
- Such order could be made if the court was satisfied that the dependant needed maintenance and after considering the needs of other dependants.⁴⁸⁰ As Beinart⁴⁸¹ points out, this underlying principle that the person claiming maintenance had to be incapable of supporting him- or herself was in line with established South African common law principles.
- The court could make the order subject to such conditions as it deemed necessary.⁴⁸²

⁴⁷⁷ Government Gazette 1221, 8 September 1965.

⁴⁷⁸ Beinart 1965 *Acta Juridica* 315. See 6.2.1 for more details.

⁴⁷⁹ Clause 2(1).

⁴⁸⁰ Clause 2(1).

⁴⁸¹ 1965 *Acta Juridica* 315.

⁴⁸² Clause 2(1).

- The respective dependants were defined in a list and included the surviving wife or husband.⁴⁸³
- Maintenance would be by way of periodical payments⁴⁸⁴ at an annual rate that did not exceed the annual income of the net estate,⁴⁸⁵ but where the annual income of the estate was insufficient to provide for the reasonable maintenance of the dependant/s of the estate, the court could order that maintenance would be by way of a lump sum.⁴⁸⁶ In addition, the court could make an order for maintenance by way of a lump sum if the dependant/s and the person with a financial interest in the estate agreed.⁴⁸⁷
- The order would be terminated on the death of the dependant or, in the case of a surviving spouse, on his or her remarriage.⁴⁸⁸ As Beinart points out,⁴⁸⁹ this was in line with common law principles that maintenance would be terminated when the person being maintained acquired sufficient means of his or her own.
- An interesting aspect of the Bill is that it provided that maintenance by way of periodical payments would be paid by someone other than the executor. In clause 2(4) it provided that the court would direct who was to make the periodical payments “and the person so directed shall not be the executor of the estate in his capacity as such”. A list of possible payers was given and included the administrator appointed by the testator to administer a trust created in the will,⁴⁹⁰ a trustee appointed by the court to administer an amount it ordered to be set aside for this purpose,⁴⁹¹ or the Master of the Supreme Court (now the

⁴⁸³ Clause 1(iii).

⁴⁸⁴ Clause 2(2).

⁴⁸⁵ Clause 2(3). “Annual income” was defined in clause 1(i) as “the income that the net estate might in the opinion of the court be expected at the date of the order, when realised, to yield in a year”. Clause 1(iv) defined “[n]et estate” as “all the property of a deceased person less the amount of his funeral and death-bed expenses, the expenses incurred in connection with the liabilities and estate duty payable out of his estate on his death”.

⁴⁸⁶ Clause 2(3).

⁴⁸⁷ Clause 2(3).

⁴⁸⁸ Clause 2(2).

⁴⁸⁹ 1965 *Acta Juridica* 315.

⁴⁹⁰ Clause 2(4)(a).

⁴⁹¹ Clause 2(4)(b).

Master of the High Court) in respect of an amount ordered by the court to be paid into the Guardian's Fund for the maintenance of a minor child.⁴⁹²

- The Bill provided a list of factors which the court should consider when determining an application for maintenance,⁴⁹³ namely:
 - the nature of the property in the net estate of the deceased and whether it would be undesirable for the dependant/s and/or any person/s who would be entitled to a particular property, if such property was realized;⁴⁹⁴
 - the past, present or future capital or income from any source of the dependant who brought the application;⁴⁹⁵
 - the conduct of the dependant in relation to the deceased⁴⁹⁶ – according to Beinart⁴⁹⁷ this would, for example, allow the court to take into account whether the applicant made any attempts toward maintaining him- or herself;
 - any other factor which the court deemed relevant or material to the application;⁴⁹⁸ and
 - the deceased's reasons for making the dispositions in his or her will, or for not making dispositions in his or her will, or for not making provision or sufficient provision for a dependant, as far as such reasons could be ascertained.⁴⁹⁹
- The court could at any time, on application, vary, suspend or rescind any order for maintenance if a substantial change had taken place in the circumstances of the dependant or the person beneficially interested in the estate, or if any material fact was not disclosed to the court at the time of the application.⁵⁰⁰

⁴⁹² Clause 2(4)(c).

⁴⁹³ Clause 2(5).

⁴⁹⁴ Clause 2(5)(a).

⁴⁹⁵ Clause 2(5)(b).

⁴⁹⁶ Clause 2(5)(b).

⁴⁹⁷ 1965 *Acta Juridica* 317.

⁴⁹⁸ Clause 2(5)(b).

⁴⁹⁹ Clause 2(5)(c).

⁵⁰⁰ Clause 5(1).

Beinart mentions that one disadvantage of the family provision scheme is that the scheme outlined in the Bill did not include an automatic formula for the determination of maintenance, which made it necessary for claimants to approach the (then) Supreme Court. This could lead to expenses on their behalf, as well as expenses for the estate, which would reduce the estate funds.⁵⁰¹ His suggestion was rather to let the claim be considered by the Master of the Supreme Court in consultation with the executor, subject to an appeal to the Supreme Court against a decision by the Master. He suggested that the factors provided for in the Bill would give sufficient guidance to the Master to consider the claim. The Master was often the first port of call for any questions under the Estates Act and there was no reason to treat the issue of maintenance differently. If necessary, the Master could be given the power to rule that the matter had to be referred to the Supreme Court if the Master could not make a decision.⁵⁰²

The Bill as presented was never accepted and the position relating to the maintenance of the spouse remained unchanged. A comment by Beinart,⁵⁰³ namely that lawyers had, through the ages, largely unsuccessfully struggled to secure rights for dependants, in particular minors, to benefit in the deceased estate of their next of kin, seems to sum up the prevailing approach (at the time of Beinart's writing) to the position of the surviving spouse. Our legislature, however, continued its efforts to intervene and in 1969 the Parliamentary Select Committee presented the Family Maintenance Bill.⁵⁰⁴ The purpose of the Bill was identical to that of the Family Provision Bill and was reflected in the preamble as "to make provision for the maintenance, out of the estate of a deceased person, of certain members of his family".

⁵⁰¹ 1965 *Acta Juridica* 318.

⁵⁰² 1965 *Acta Juridica* 321.

⁵⁰³ 1965 *Acta Juridica* 322.

⁵⁰⁴ A.B. 27–'69.

The Bill largely followed the structure of the Family Provision Bill and provided as follows:

- Where a person died after the commencement of the Act (assuming the Bill translated into an Act) and left an estate in the Republic (which included the then South-West Africa (now Namibia)),⁵⁰⁵ a dependant of the deceased could apply to the executor of the estate for the payment of maintenance out of such estate.⁵⁰⁶ The executor could refuse the application or agree to payment if satisfied that the dependant required assistance to provide for his or her own maintenance, and that it would be just and equitable to pay maintenance to the applicant. The executor could also attach conditions to the payment if it was deemed necessary.⁵⁰⁷
- In considering the claim, the executor would have regard to:
 - the nature of the property in the net estate;⁵⁰⁸
 - whether realisation of the property would be undesirable for the dependants who may claim maintenance and/or any other persons with a financial interest in the estate;⁵⁰⁹
 - the past, present or future capital or income of the dependant from any source.⁵¹⁰
- The payment of maintenance in the case of a spouse would terminate on his or her remarriage.⁵¹¹
- The maintenance would be by way of periodical payments⁵¹² and the total amount payable in any given year would not exceed the annual income of the net estate, subject to one exception⁵¹³ – where in any particular case the annual

⁵⁰⁵ Clause 1(ix).

⁵⁰⁶ Clause 2(1).

⁵⁰⁷ Clause 2(2).

⁵⁰⁸ Clause 6(5)(a).

⁵⁰⁹ Clause 6(5)(a).

⁵¹⁰ Clause 6(5)(b).

⁵¹¹ Clause 6(6)(a).

⁵¹² Clause 6(1).

⁵¹³ Clause 6(2). The Bill defined “annual income” as “the income that such estate, if it were realised, might in the opinion of the executor, master, judge or court in question be expected to yield in a year.”

income was insufficient to make reasonable provision for maintenance or where the dependant(s) and the persons with a financial interest in the estate agreed, maintenance could in whole or in part be by way of a lump sum payment.⁵¹⁴

- The dependant(s) and persons financially interested in the estate could agree by whom the maintenance was payable but, if they failed to do so, the Master would decide by whom it would be paid.⁵¹⁵ The executor could, however, not be the liable party.⁵¹⁶
- The dependant or any other person with a financial interest in the estate who felt aggrieved by the decision of the executor could object to the Master in writing.⁵¹⁷ The Master would then consider the matter and confirm, vary or set aside the executor's decision. If the objector was aggrieved by the decision of the Master, he or she could appeal the decision by way of application on notice of motion to a judge in chambers.⁵¹⁸ The judge would then, like the Master, confirm or vary the Master's decision or set aside the decision and give the decision that the court feels should have been given by the Master.⁵¹⁹
- The Master could vary, suspend or rescind any agreement or decision or order relating to the payment of maintenance on application by the person who was paying the maintenance or by any person with a financial interest in the estate, on the basis that a material fact was not disclosed when the initial application was made, or that a substantial change had occurred in the circumstances of the dependant or the person with a financial interest in the estate.⁵²⁰ The Master had the power to direct a dependant to refund any amount of maintenance which he was of the opinion should not have been paid.⁵²¹ Should the dependant fail to refund the amount, the person paying maintenance could file

⁵¹⁴ Clause 6(3).

⁵¹⁵ Clause 6(4)(a).

⁵¹⁶ Clause 6(4)(b).

⁵¹⁷ Clause 3(1).

⁵¹⁸ Clause 3(3).

⁵¹⁹ Clause 3(5).

⁵²⁰ Clause 8(1).

⁵²¹ Clause (2)(a).

a copy of the Master's direction with a court, which would have the effect of a civil judgment by that court.⁵²²

The Bill was referred by the House of Assembly to a Select Committee of Parliament for consideration on 8 May 1969. The Select Committee delivered their Report⁵²³ in terms of which they rejected the Bill. The following reasons were given for the rejection:

- The legislation would result in “a serious inroad being made into the well-established principle of freedom of testation” and the committee felt that it would not be in the public interest to enact legislation merely to provide for what the committee felt was the exceptional case where protection was required by a dependant;
- The liquidation and distribution process of deceased estates affected by the provisions of the proposed legislation might be inordinately delayed; and
- It would not be equitable “for a dependant in all cases to be paid maintenance out of an estate”.

Hahlo⁵²⁴ observes that at the time when the committee rejected the Bill, there were only two countries in the world that had neither a fixed legitimate portion nor some kind of maintenance legislation, and South Africa was one such country.⁵²⁵ I am of the opinion that this fact alone indicated the dire need for reform in South Africa. Hahlo makes the following comments on the Committee's reasons for rejecting the Bill:

- The fact that the instances of a man disinheriting his wife or children were the exception, did not provide a ground for rejecting remedial legislation intended to deal with such exceptional cases.⁵²⁶ The majority of men did not have to be admonished to make them carry out their natural duty to support their children,

⁵²² Clause 8(2)(b).

⁵²³ Report of the Select Committee on the Family Maintenance Bill [S.C 9-‘69’] as quoted in Hahlo 1971(88)2 *SALJ* 209.

⁵²⁴ 1971(88)2 *SALJ* 204.

⁵²⁵ According to Hahlo the other country was Quebec. It should be noted though that Quebec was never a country and has always been part of Canada.

⁵²⁶ 1971(88)2 *SALJ* 202.

yet there was elaborate maintenance legislation to deal with those instances where fathers did not fulfil their duties in this regard.⁵²⁷ It therefore did not make sense to reject legislation that would similarly allow for exceptional cases where widows were left destitute by their husbands. Hahlo states further⁵²⁸ that the reference by the committee to the principles of freedom of testation was unnecessary as the committee was not asked whether freedom of testation should be abolished or curtailed, but rather whether the courts should in exceptional cases have the discretionary power to award maintenance to a surviving spouse (or adult children) out of the estate of the deceased spouse if the first-dying spouse (or parent) did not provide for the survivor in his or her will. He quotes Professor Joseph Laufer who had once said⁵²⁹ that the purpose of maintenance legislation was “to correct ... flagrant moral abuses”. Hahlo surmises⁵³⁰ that the Select Committee’s response indicated that they were convinced that such abuses did not occur in South Africa and that all cases of disinherison had adequate justifying reasons.

- There was some merit in the comment that a maintenance claim would lead to a delay in the liquidation and administration of the estate. However, after considering the position in England, New Zealand and Australia, Hahlo concludes⁵³¹ that such delays would not give rise to serious difficulties. He bases this view on the fact that, at that stage, it had been settled law in South Africa for almost a century that a court could award maintenance to a minor child out of the estate of his or her deceased parent, and there had been hardly any complaints about delays caused by this.⁵³² There should therefore be no specific reason why any delay occasioned by a claim by the surviving spouse would be problematic.

⁵²⁷ 1971(88)2 SALJ 202.

⁵²⁸ 1971(88)2 SALJ 203.

⁵²⁹ (1955) 69 *Harv LR* 277 “Flexible restraints on testamentary freedom – a report on decedents’ family maintenance legislation” 295.

⁵³⁰ 1971(88)2 SALJ 203.

⁵³¹ 1971(88)2 SALJ 203.

⁵³² 1971(88)2 SALJ 203.

- Hahlo⁵³³ rejects the committee's statement that "it will not be equitable for a dependant in all cases to be paid maintenance out of an estate". As he points out, it was clear from the contents of the Bill that the award of maintenance would not operate in all cases, but would only apply if the executor was satisfied that the dependant was in need of assistance adequately to provide for his or her maintenance, and that such award of maintenance would not encroach on the interest of the heirs of the estate.⁵³⁴ The award of maintenance to a dependant would therefore always be an exceptional occurrence, rather than a matter of course.

Hahlo⁵³⁵ points out that the committee could have used another more valid argument against a provision for maintenance in favour of the spouse, namely that the surviving spouse of a marriage in community of property would by law be entitled to a half share of the joint estate. He concedes⁵³⁶ though that while many marriages in South Africa at that time were still in community of property, most people of means or prospects excluded this matrimonial property system by way of an antenuptial contract. He concludes⁵³⁷ that the answer to the question whether legislation dealing with family maintenance was desirable, would depend on one's personal philosophy towards unrestricted freedom of testation and whether it conformed to the social norms of the time. His view is that some form of provision had to be in place, at least to bring South Africa in line with the rest of the world.⁵³⁸ Several other writers⁵³⁹ also criticised the decision of the Select Committee and suggested that our law should move away from a discussion around the legitimate portion and rather focus on the maintenance needs of the spouse.

⁵³³ 1971(88)2 SALJ 203.

⁵³⁴ 1971(88)2 SALJ 204.

⁵³⁵ 1971(88)2 SALJ 204.

⁵³⁶ 1971(88)2 SALJ 204.

⁵³⁷ 1971(88)2 SALJ 204.

⁵³⁸ 1971(88)2 SALJ 204.

⁵³⁹ Rowland 1970(2) *Codicillus* 4, 1972(75)4 *Codicillus* 48; Rowland "Aspects of the law governing contingencies for which the testator has not provided" 1972(75)4 *THRHR* 315, 1973(36)1 *THRHR* 63, 147, 274; Miller 1980 *Acta Juridica* 49; Marx 1986 *Obiter* 84.

In September 1970 a neighbour of South Africa, Botswana, published the Succession (Rights of the Surviving Spouse and Inheritance Family Provision) Bill.⁵⁴⁰ The country's common law system was based on Roman-Dutch law which had been imported by means of a reception statute⁵⁴¹ from the Cape of Good Hope colony, and it applied the principle of complete freedom of testation.⁵⁴² The two main purposes of the Bill were to introduce the power for the court to order payment for the benefit of the surviving spouse or dependent child out of the estate of a deceased person, and to increase the provision made for surviving spouses on intestacy.⁵⁴³ The Bill was accompanied by a memorandum by the Acting Minister of State in which the reasons for the Bill were explained. As Himsworth⁵⁴⁴ pointed out, the memorandum was as forthright in asserting the values of the Bill as the South African Select Committee was in rejecting the 1969 Family Maintenance Bill. It provided in section 4 that a person married out of community of property was able in his or her will to leave all his or her assets to anyone of his or her choice, which could lead to a situation where the widow and/or children were left destitute. The Acting Minister of State who signed the memorandum noted that this was "manifestly wrong" and stated that the Bill sought to remedy the situation by enabling a surviving spouse or the children of a deceased person to apply to the court for adequate provision to be made for them out of the estate of the deceased.⁵⁴⁵ The Bill was accepted and introduced as an Act in Botswana in December 1971. Himsworth⁵⁴⁶ commented that by adopting the legislation, Botswana took the lead in the "Roman-Dutch countries" of Southern Africa to join the rest of the Western world who already had some level of provision for the families of deceased persons.

⁵⁴⁰ 51 of 1970.

⁵⁴¹ The General Law Proclamation of 1909.

⁵⁴² Himsworth "A new Family Provision Act" 1972(89)1 *SALJ* 128–134.

⁵⁴³ Himsworth 1972(89)1 *SALJ* 128.

⁵⁴⁴ 1972(89)1 *SALJ* 128.

⁵⁴⁵ Para 4 of Memorandum.

⁵⁴⁶ 1972(89)1 *SALJ* 129.

In 1984 a further attempt was made in South Africa to regulate the maintenance of the surviving spouse after the death of the other spouse. The Second Bill on Matrimonial Property 1984, which was the culmination of the acceptance by the Parliamentary Select Committee on Matrimonial Property Law⁵⁴⁷ of the new matrimonial property regime, contained some provisions in this regard. Clause 4 of the Bill provided for a procedure whereby the court, on request of the former spouse of a marriage that was dissolved by divorce or the death of one spouse, could “make over” a reasonable portion of the deceased or divorced spouse’s estate to the claimant. The term “reasonable portion” was defined in clause 4(7) to be limited to the larger of a child’s share or a one quarter share of the estate.

According to Sonnekus⁵⁴⁸ this provision mirrored the provision for “reasonable financial provision” contained in the Inheritance (Provision for Family and Dependants) Act 1975 in England. He also comments⁵⁴⁹ that the provisions of the Bill, if accepted, would be contrary to the principle of freedom of testation and that it looked like a badly concealed attempt to resurrect the legitimate portion. He is of the opinion⁵⁵⁰ that the reasons put forward for the rejection of the Family Maintenance Bill in 1969 are still valid and argues that there is no reason why any person should have a legally recognised entitlement to a fixed portion of a deceased person’s estate merely because of the family relationship between the person and the deceased. As far as the position of the spouse was concerned, he reconfirms⁵⁵¹ the principle that the reciprocal duty of support between spouses comes to an end when the marriage terminated and concludes⁵⁵² that there is no legally conclusive reason why a healthy adult who could maintain him- or herself by working, could lay claim to maintenance from another

⁵⁴⁷ GK 11-83.

⁵⁴⁸ 1990-3 *TSAR* 492-513.

⁵⁴⁹ “Legitieme porsie of verlengde onderhoudsaanspraak?” 1984(195) *De Rebus* 119-121; 1990-3 *TSAR* 493.

⁵⁵⁰ 1984(195) *De Rebus* 119; 1990-3 *TSAR* 495.

⁵⁵¹ 1984(195) *De Rebus* 119.

⁵⁵² 1984(195) *De Rebus* 120.

person or his or her estate. He suggests⁵⁵³ that the underlying principle of most comparable legal systems is that every healthy adult should be responsible for his or her own maintenance needs and should not look to another person for this merely because there was some relationship between them. The extended maintenance claim is contrary to this principle and the surviving spouse should therefore be required to become self-sufficient on the death of the other spouse.⁵⁵⁴

While there clearly is some merit in Sonnekus' argument, the reality is that the traditional family concept in South Africa at that time was that the husband was the breadwinner and the wife looked after the children and the household. This surely placed certain limitations on the wife's ability to be responsible for her own maintenance needs and to become self-sufficient after the death of her husband. Even the then Appellate Division in *Beaumont v Beaumont*⁵⁵⁵ referred to the wife's "common law duty" of care of the family when it held⁵⁵⁶ that, where the wife did not contribute financially to the marriage but took care of the family, this was sufficient to allow her to lay claim to a portion of her husband's estate. Sonnekus⁵⁵⁷ does, however, concede that in the case of spouses who enjoyed a long marriage, the surviving spouse may on the death of the other spouse have an immediate need for accommodation and furniture. His suggestion⁵⁵⁸ is that this need be met by providing the spouse with a usufruct or right of *habitatio* over the erstwhile matrimonial home. Although the heirs to the estate would have to wait until the death of the surviving spouse before receiving full ownership, they at least had naked ownership in the meantime, and would ultimately receive full ownership.⁵⁵⁹ As Sonnekus⁵⁶⁰ points out, neither the legitimate portion nor

⁵⁵³ 1984(195) *De Rebus* 120.

⁵⁵⁴ 1990-3 TSAR 496.

⁵⁵⁵ 1987 (1) SA 967 (A).

⁵⁵⁶ 996H-997H. This case dealt with divorce, but there is no reason why the principle should not also have applied to dissolution of a marriage by death.

⁵⁵⁷ 1990-3 TSAR 496.

⁵⁵⁸ 1990-3 TSAR 496.

⁵⁵⁹ 1990-3 TSAR 496.

⁵⁶⁰ 1990-3 TSAR 497.

the allocation of assets to the surviving spouse would achieve this result. He argues⁵⁶¹ that the vague reference in the Memorandum to social norms that dictate against the surviving spouse being disinherited, does not provide sufficient justification for going against the principle of freedom of testation and the principle of healthy adults being responsible for their own maintenance requirements.

He states further⁵⁶² that the information provided simply did not support an argument that there was a statistically proven need to accommodate surviving spouses who were left destitute on the deaths of their spouses. He argues⁵⁶³ that there was probably more justification for a maintenance claim before 1984 as spouses had only the option to be married in or out of community of property. Where a marriage was in community of property, the surviving spouse would retain half of the joint estate, which would give him or her some protection on the dissolution of the marriage. A marriage out of community of property would not extend the same protection. Sonnekus concedes⁵⁶⁴ that many spouses might have chosen marriage out of community of property without fully understanding the consequences, which could mean that a surviving spouse was unintentionally left without protection,⁵⁶⁵ but this could be remedied as the parties had the right to change their matrimonial property regime by making the accrual system applicable to their marriage.⁵⁶⁶ Since the introduction of the accrual system in 1984, a marriage out of community of property would automatically be subject to the accrual system unless the spouses consciously chose to exclude it. The accrual system to a large extent removed the clear distinction between marriages in community of property and marriages out of community of property, as the surviving spouse of a marriage subject to the accrual system would in any event share in the accrual of the first-dying spouse's

⁵⁶¹ 1990-3 TSAR 499.

⁵⁶² 1990-3 TSAR 499.

⁵⁶³ 1990-3 TSAR 499.

⁵⁶⁴ 1990-3 TSAR 499.

⁵⁶⁵ 1990-3 TSAR 499.

⁵⁶⁶ 1984(195) *De Rebus* 120.

estate.⁵⁶⁷ It could therefore be argued that, where the spouses had made the choice to exclude the accrual system, and one spouse disinherited the other, an extended maintenance obligation on the death of the one spouse could not be justified as it would go against the expression of their free will.⁵⁶⁸ Sonnekus suggests⁵⁶⁹ that if, in a particular case, it was deemed that a claimant was entitled to maintenance from the estate of the deceased spouse, such a conclusion could only be reached after comprehensive evaluation of all applicable circumstances.

Sonnekus concludes⁵⁷⁰ that the need for legislative interference was doubtful as the destitute widow (“onversorgde weduwe”) scenario was not sufficiently prevalent to require legislative intervention. There would, at most, be some instances where legislative interference was required, and a general, legal entitlement to maintenance could therefore not be justified.⁵⁷¹ Acceptance of the proposal of a “reasonable portion” would be better aligned to a legitimate portion than to a genuine attempt to provide for the maintenance requirements of the spouse, as the reasonable portion principle would amount to payment of a once-off settlement, which would not take into account any changes in the maintenance needs of the spouse. He prefers the position in some European countries⁵⁷² where the move was away from a simplistic legitimate portion to a maintenance claim by a person who was not merely needy (“behoefstig”) but was justifiably entitled to maintenance from the estate of the particular deceased.⁵⁷³ That being said though, he points out⁵⁷⁴ that the ideal of periodical payment of maintenance out of the estate would lead to an unacceptable delay in the finalisation of the deceased

⁵⁶⁷ This presupposes that the first-dying spouse had the larger accrual – it does not appear as if Sonnekus contemplated a scenario where the first-dying spouse had the smaller accrual (resulting in a claim against the survivor) or where the survivor had the larger accrual but was still dependent on the first-dying spouse for maintenance.

⁵⁶⁸ 1990-3 TSAR 499.

⁵⁶⁹ 1984(195) *De Rebus* 120.

⁵⁷⁰ 1984(195) *De Rebus* 120.

⁵⁷¹ 1984(195) *De Rebus* 120.

⁵⁷² For example, Switzerland and Netherland.

⁵⁷³ 1990-3 TSAR 494.

⁵⁷⁴ 1984(195) *De Rebus* 120.

estate and would therefore impact negatively on the vested rights of the heirs to the estate. His suggestion⁵⁷⁵ is that, should a statutory entitlement to maintenance be granted, it should be for a limited period only and the amount should be calculated actuarially. The resultant amount should be placed in a special guardian's fund, with monthly payments made to the claimant. This would ensure that the balance of the funds would remain available to the deceased's heirs should the claimant's maintenance requirements be reduced for whatever reason, or should he or she remarry or die before all the funds were utilised.⁵⁷⁶ I agree with this suggestion, although my contention is that a trust would be a better solution, despite the costs associated with the setting up and administering of a trust. The use of a trust is discussed further in chapter 8.

The provisions regarding maintenance in the Second Bill on Matrimonial Property were never enacted by our legislature, but it was evident that reform was necessary. This was especially clear when considering that, quite often, a divorced spouse was in a better financial position after the death of his or her former spouse than the spouse who was still married at the time of death of the other spouse. If maintenance was made part of a divorce order, the right thereto did not automatically end with the death of the payee spouse, but where the marriage still subsisted at the time of death of one of the spouses, the right to maintenance did come to an end.⁵⁷⁷

The legislature continued with attempts to provide for the surviving spouse. In 1984, during the parliamentary debate on the Matrimonial Property Bill,⁵⁷⁸ the Minister of Justice announced that the South African Law Commission had been tasked to investigate the introduction of a legitimate portion or the granting of a right to

⁵⁷⁵ 1984(195) *De Rebus* 120.

⁵⁷⁶ 1984(195) *De Rebus* 120.

⁵⁷⁷ Jordaan Unpublished LLD thesis, University of South Africa (1987) 663.

⁵⁷⁸ Now the Matrimonial Property Act 88 of 1984.

maintenance to the surviving spouse as part of their review of the law of succession.⁵⁷⁹

This research resulted in a Report by the Law Commission.⁵⁸⁰

The Report looked briefly at the background to the South African legal position and proceeded to examine the reasons dictating reform. The points raised as support for reform were:

- The default matrimonial property regime in South Africa for non-black persons was in community of property. While the surviving spouse would receive his or her half share of the estate by virtue of the marriage, there was no guarantee that this share would be adequate to provide for his or her support;⁵⁸¹
- The default matrimonial property regime for black persons was out of community of property and of profit and loss⁵⁸² and the possibility of a disinherited spouse being left indigent was therefore quite prevalent;⁵⁸³
- Where the marriage was out of community of property, the parties could include a marriage settlement in the antenuptial contract which could meet their needs – they could, for example, provide for income for each other after the dissolution of the marriage. There was, however, no guarantee that such a settlement would be adequate at the time of dissolution as it would be difficult to agree before the marriage on a realistic marriage settlement that would only apply in the future;⁵⁸⁴
- The popularity of marriages out of community of property⁵⁸⁵ (pre-1984) and the fact that the default matrimonial property regime for black persons was out of

⁵⁷⁹ 1984 Hansard 8584.

⁵⁸⁰ South African Law Commission *Report Review of the law of succession: the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse* Project 22 Pretoria, 1987.

⁵⁸¹ Par 3.1.

⁵⁸² Corbett, Hahlo and Hofmeyr *The law of succession in South Africa* 34.

⁵⁸³ Par 3.1.

⁵⁸⁴ Par 3.2.

⁵⁸⁵ Van der Vyver & Joubert 570-574; Hahlo "New look in community systems" 1967(84)1 *SALJ* 89; Sinclair 1981(98)4 *SALJ* "Financial provision on divorce - need, compensation or entitlement?" 1981(98)4 *SALJ* 479.

community of property, meant that there was a greater possibility of disinherited surviving spouses;⁵⁸⁶

- Where the marriage was out of community of property and entered into after 1984, the parties had the option of applying the accrual system (which would apply unless they expressly excluded it). Although this left the spouse whose estate had the smaller accrual with a claim against the estate of the other spouse, it did not follow that settlement of the claim would necessarily provide adequate support for the survivor;⁵⁸⁷
- The statistics provided by the Department of Justice indicated that the accrual system applied in roughly 61% of antenuptial contracts registered in the period December 1984 to December 1985.⁵⁸⁸ This left a significant number of marriages where community of property was excluded and where the surviving spouse could accordingly be left destitute if his or her first-dying spouse did not provide for him or her in terms of a will;
- Where the deceased died intestate, the amount the surviving spouse inherited was dependent on the matrimonial property regime applicable to the marriage and on the other intestate heirs who survived the deceased.⁵⁸⁹ The minimum amount the spouse was entitled to (taking the above factors into consideration and assuming the estate was large enough) had, however, always been relatively small;⁵⁹⁰
- In some instances, although a spouse was disinherited, he or she may still be provided for by way of other means, such as life assurance or pension schemes.⁵⁹¹

⁵⁸⁶ Par 3.3.

⁵⁸⁷ Par 3.4; Sinclair 1981(98)4 *SALJ* 479; Sonnekus 1984(195) *De Rebus* 120.

⁵⁸⁸ Par 3.4.

⁵⁸⁹ Par 3.5.

⁵⁹⁰ The amount is fixed from time to time by the Minister of Justice by notice in the Government Gazette. At the time of publication of the Working Paper it was R50 000, although the Law Commission had at that stage already recommended that it be increased to R100 000.

⁵⁹¹ Par 3.6.

The Report then looked at data on the number of instances where surviving spouses were left indigent by reason of their spouse disinheriting them and found that such data was rather sparse.⁵⁹² The available information reflected that, out of a sample of 1 000 estates reported to the Master of the Supreme Court, Pretoria, during the period 1 January 1979 to 15 October 1979,⁵⁹³ there were only 71 cases where the surviving spouse was not the sole heir. Of those 71 estates, there were only ten where the surviving spouse inherited nothing and also received nothing in terms of matrimonial property law. In seven of those ten cases, the survivor was the husband. As it was assumed that the men probably had an income of their own and it was therefore unlikely that they were indigent, the focus moved to the remaining three estates. In one of these estates it appeared that the widow had been provided for from other sources. This left two estates, but the information at hand was insufficient to determine whether the widows had indeed been left indigent.

The Commission concluded,⁵⁹⁴ based on comparative analysis of the position in England, Canada and the United States of America, that this very limited sample indicated that disinheritance of the spouse was theoretically possible but was the exception rather than the rule. This conclusion was also partly based on the comments received by the Commission on Working Paper 13, issued as part of the project. As an example, the Association of Law Societies, representing attorneys, commented that there might be good reason for a surviving spouse being disinherited.⁵⁹⁵ It is interesting to note that the Masters of the Supreme Court commented that there were certain instances where it would in fact be preferable to accommodate the surviving spouse.⁵⁹⁶ One such instance was where the first-dying spouse had omitted to change his or her will after getting married. I suggest that a counter-response to this could be that the first-dying spouse

⁵⁹² Par 3.7.

⁵⁹³ Data taken from South African Law Commission Report on the *Review of the law of succession: intestate succession* 10-11, 35-38.

⁵⁹⁴ Par 3.11.

⁵⁹⁵ Par 3.11.

⁵⁹⁶ Par 3.11.

might have actively elected not to change his or her will to provide for the spouse and that this apparent omission did not automatically translate into a need to accommodate the surviving spouse. The Masters also referred to the scenario where the first-dying spouse, from an objective perspective, had no reason to disinherit his or her spouse. My counter-response would be that the first-dying spouse's reasons for disinheriting the surviving spouse might be very valid, despite there being no apparent objective explanation for it. The Commission mentioned⁵⁹⁷ that they had considered analysing a more comprehensive sample of estates but decided against it for financial reasons. It is, however, apparent that they were happy to accept the Masters' contribution that there were indeed instances of unjustifiable disinheritance of surviving spouses.⁵⁹⁸

Despite the conclusion that disinheritance was the exception to the rule, the Commission felt that legal reform, albeit on a limited basis, was necessary.⁵⁹⁹ Before looking at the different options to achieve this, they looked at the arguments against reform. The main objectors to the legal reform were the Association of Law Societies, the Association of Trust Companies and the Clearing Bankers Association of South Africa. The main arguments presented against legal reform were:⁶⁰⁰

- Legislation providing for a disinherited spouse would encroach on the principle of freedom of testation. The Commission, however, suggested that absolute freedom of testation might well be undesirable because the social controls that ensure that most living persons conform to the social norms of society are absent when dealing with something that would only happen after a person's death.⁶⁰¹ It suggested further that this argument for absolute freedom of testation would only work if the public sentiment was in favour of absolute freedom of testation – the comments it had received on the Working Paper, however, made it clear that public sentiment was generally in favour of

⁵⁹⁷ Par 3.12.

⁵⁹⁸ Par 3.12.

⁵⁹⁹ Par 3.14.

⁶⁰⁰ Par 4.1.

⁶⁰¹ Par 4.2.

protection for the disinherited spouse.⁶⁰² They therefore concluded that society would readily accept attempts to moderate freedom of testation in order to provide some protection for the surviving spouse.

- Legislation was undesirable as the disinherited spouse was the exception and the legislature should not enact legislation for exceptional cases. The committee's view was that the public sentiment referred to above made it clear that there was a social norm that dictated against surviving spouses being disinherited.⁶⁰³ This norm was also confirmed by the fact that disinheritance rarely occurred. As the law often supported a social norm by compelling those who do not conform to the norm to do so, there was no reason why the legislature could not intervene to accommodate the disinherited spouse.⁶⁰⁴
- Spouses are free to choose the matrimonial property regime that applies to their marriage and they therefore have only themselves to blame if their choice is prejudicial to them. The fact that the accrual system applies automatically unless excluded indicates that the law regards it as the preferable matrimonial regime. Therefore, if the parties choose to exclude it, they cannot blame anyone other than themselves if the result is prejudicial to them. The Commission suggested⁶⁰⁵ that this was a valid argument from a purely judicial point of view, but it was probably unreasonable in the South African context where the negative view of marriage in community of property (relating to the restriction of the woman's contractual capacity) might have misled young couples into believing that a marriage out of community of property was necessarily the best choice for them.⁶⁰⁶ Furthermore, from a practical point of view, even if the accrual system was to apply, it did not provide any safeguard that the surviving spouse would be adequately protected. This would hold true whether the choice of the accrual system was proven to have been wrong from the outset or

⁶⁰² Par 4.3.

⁶⁰³ Par 4.5.

⁶⁰⁴ Par 4.5.

⁶⁰⁵ Par 4.6.

⁶⁰⁶ Par 4.6.

whether changing circumstances made it wrong at a later stage during the marriage.

The Commission concluded⁶⁰⁷ that the fact that disinheritance was the exception, did not result in legal intervention being unnecessary, but indicated that it was required in order to accommodate such exceptions. It was illogical to disallow the continuation of a duty of support that existed during a marriage, after the death of one party in circumstances where the survivor could not support him- or herself and where the estate of the first-dying spouse was capable of caring for the surviving spouse.⁶⁰⁸

The Commission proceeded to look at the two possible methods to protect the surviving spouse, namely a claim for maintenance and a legitimate portion of the estate.⁶⁰⁹ It considered the following factors in favour of a claim for maintenance:⁶¹⁰

- The legitimate portion would be the most appropriate solution if the intention was to protect the surviving spouse's moral right to share in the estate of his or her deceased spouse. This approach of looking at the moral right to share in the estate could perhaps be based on the view that both parties contribute to the income of the marriage.⁶¹¹ The Commission, however, felt that this should not be the basis for legal reform as a moral right to share in the estate would negate the freedom of choice prospective parties to a marriage had regarding their matrimonial property regime;⁶¹²
- If the intention was to enforce the deceased's moral duty to provide for the surviving spouse, the claim for maintenance would be more appropriate;⁶¹³

⁶⁰⁷ Par 4.1; Miller 1980 *Acta Juridica* 60.

⁶⁰⁸ Par 4.3–4.4, 4.8.

⁶⁰⁹ Par 5.1.

⁶¹⁰ Par 5.2 to 5.11.

⁶¹¹ Van der Vyver & Joubert 562-563.

⁶¹² Par 5.2.

⁶¹³ Par 5.2; Hahlo 1959(76)4 *SALJ* 444.

- A legitimate portion would benefit all surviving spouses, regardless of whether they actually needed such benefit – this would fly in the face of the conclusion that the destitute surviving spouse was the exception rather than the rule;⁶¹⁴
- The “legitimate portion” concept is not flexible as it takes no cognisance of the actual needs of the surviving spouse.⁶¹⁵ The surviving spouse would automatically be entitled to a portion of the first-dying spouse’s estate, despite the financial position of the survivor. The claim for maintenance, in contrast, can be tailored according to the spouse’s financial position and needs and can take into consideration any other benefits that the survivor received during the marriage;⁶¹⁶
- The legitimate portion is usually a fixed percentage or part of an estate, and there is no guarantee for the surviving spouse that such portion will achieve its aim of providing him or her with sufficient means.⁶¹⁷ The Commission felt that the imposition of a prescribed minimum amount to circumvent this objection would be an unjustifiable interference with freedom of testation;⁶¹⁸
- Any attempt to introduce the legitimate portion would have to be made by way of complicated legislation.⁶¹⁹

The Commission also considered the criticism against a claim for maintenance. One objection was that most of the family maintenance systems considered by the Commission required the claimant to go to court. The Commission felt this could be costly and time-consuming, would place an additional workload on the courts, would involve the embarrassment for the spouse of a public court case and could delay the administration of the estate.⁶²⁰ However, most of these issues could be overcome by making the court the last resort and requiring it to become involved only in the event of

⁶¹⁴ Par 5.3.

⁶¹⁵ Beinart 1965 *Acta Juridica* 314.

⁶¹⁶ Par 5.4; Beinart 1965 *Acta Juridica* 314.

⁶¹⁷ Par 5.4.

⁶¹⁸ Par 5.4.

⁶¹⁹ Par 5.7.

⁶²⁰ Par 5.6.

a dispute, which would address the issues relating to time, cost and workload.⁶²¹ Another alternative was to give the lower courts the necessary authority to decide on maintenance matters as this would also address the issues relating to time and cost.⁶²² The Commission did not judge the possible embarrassment of a court case as sufficient reason to reject a claim for maintenance as a solution and felt⁶²³ that delays in the administration of the estate could occur even if the claimant was not required to go to court to prove his or her claim. It was further of the opinion⁶²⁴ that the possibility of delays in the administration of estates was merely something to bear in mind when drafting legislation and did not justify choosing the legitimate portion as a solution.

The Commission reported that, out of the 23 commentators, some generally supported the Commission's tentative proposal of a claim for maintenance and five commentators explicitly favoured a claim for maintenance. One commentator suggested a claim for maintenance in addition to a legitimate portion,⁶²⁵ and one commentator favoured a legitimate portion for reasons of simplicity and costs.⁶²⁶ The Commission considered another alternative way of dealing with this matter, namely empowering the courts to order a redistribution of the estate in order to give the surviving spouse an equitable share of the estate.⁶²⁷ It could, however, find no support for this option, as a redistribution order was based on the idea that a spouse has a moral right to share in the estate, which it had already indicated should not be the basis for reform.⁶²⁸ Furthermore, there was no guarantee that the portion of the estate that was regarded as an equitable share would in fact be sufficient to meet the surviving spouse's needs.⁶²⁹

⁶²¹ Par 5.6.

⁶²² Par 5.6.

⁶²³ Par 5.6.

⁶²⁴ Par 5.6.

⁶²⁵ Par 5.9.

⁶²⁶ Par 5.10.

⁶²⁷ Par 5.11.

⁶²⁸ Par 5.13.

⁶²⁹ Par 5.12.

The Commission therefore concluded⁶³⁰ that a duty of support in favour of the surviving spouse should by law be placed on the estate of a deceased person. It proposed a maintenance claim on the following basis:

- The basis for such a claim would be a proven need for support as that was in line with the approach of the South African law regarding maintenance;⁶³¹
- The claim would be available regardless of the matrimonial property regime applicable to the marriage;⁶³²
- The claim would apply regardless of whether the deceased died testate, intestate or partly intestate;⁶³³
- As the basis for the claim would be the surviving spouse's inability to support him- or herself, everything falling into the estate of such surviving spouse should be taken into account when calculating need.⁶³⁴ This would include amounts due to him or her as a result of the matrimonial property regime, bequests, a usufruct over the deceased's property, life assurance, pensions and any settlements made by the deceased during his or her lifetime;⁶³⁵
- The legislation should make it clear that the survivor's "own means" included everything received by the surviving spouse under the matrimonial property regime, law of succession or as a result of the death of the first-dying spouse;⁶³⁶
- The claim would be available only to the surviving spouse of a marriage and not also to divorced spouses who received maintenance from a former spouse in terms of a court order;⁶³⁷
- The claim would rank after those of ordinary creditors, but before legacies and bequests;⁶³⁸

⁶³⁰ Pars 6.2–6.14.

⁶³¹ Van der Vyver & Joubert 632, 691.

⁶³² Par 6.3.

⁶³³ Par 6.4.

⁶³⁴ Par 6.5.

⁶³⁵ Par 6.5. It is interesting to note that the Working Paper had indicated that the survivor's capital should be exhausted before there could be a need for support. The Report, however, simply required that the capital should be taken into account when establishing if there was a need for support.

⁶³⁶ Par 6.5.

⁶³⁷ Par 6.6.

- The claim would rank equally with the claim for maintenance by a minor child as both claims were based on the principle of need;⁶³⁹
- The claim for maintenance would be allowed only if the surviving spouse could prove that he or she was unable to provide for his or her own reasonable maintenance needs;⁶⁴⁰
- “Reasonable need” would depend on the circumstances of each case and would be determined by taking several factors into consideration.⁶⁴¹ The Commission considered a suggestion that those factors should correspond to the factors that are taken into account when a marriage is dissolved by divorce. The Divorce Act lists the following factors:
 - a. The existing or prospective means of each party;
 - b. The parties’ respective earning capacities;
 - c. The parties’ financial needs and obligations;
 - d. The age of each party;
 - e. An order regarding the transfer of assets from one party to the other;
 - f. The duration of the marriage;
 - g. The parties’ conduct in so far as it may be relevant to the breakdown of the marriage;
 - h. Any other factor which in the opinion of the court should be taken into account.

The Commission felt that factors a. to e. related to the need for support and whether the person who was obliged to support was able to do so, making these factors important.⁶⁴² It is interesting to note that the Commission indicated that, as far as those factors were not expressly included in clauses 1(1) and (2) of the Bill, they were included by implication. It further held that factor f. should be considered only in so far as it did not introduce a moral judgement into the

⁶³⁸ Par 6.9.

⁶³⁹ Par 6.10-6.11.

⁶⁴⁰ Par 6.14.

⁶⁴¹ Par 6.15.

⁶⁴² Par 6.16.

decision.⁶⁴³ The Commission held that factor g. required a moral judgement which was contrary to the idea of reasonable need as basis for the claim. The survivor's conduct and statements made by the first-dying spouse on the reasons for disinheriting the survivor should therefore not be taken into account;⁶⁴⁴

- A surviving spouse should not be forced to approach the court to prove his or her claim – as with any other claim, the provisions of the Estates Act would apply. Any interested party who was dissatisfied with the executor's acceptance or rejection of a claim would be able to lodge an objection with the Master of the Supreme Court and await his or her ruling. If the Master's decision was unacceptable to an interested party, he or she could approach the court, which meant that legal costs and a delay in the administration of the estate would only arise in such instances.⁶⁴⁵ The Commission mentioned⁶⁴⁶ the practice in the offices of the Masters of the Supreme Court to not adjudicate factual disputes, but was nevertheless of the view that the instances of there being an indigent spouse as a result of disinheritance was the exception; deserving claims would therefore be rare. It also did not see the need to impose any duties on the Master to adjudicate matters where the parties did not agree;⁶⁴⁷
- The Commission also considered⁶⁴⁸ whether any time limits should be imposed on the contemplated claim. It compared the survivor's claim to that of a minor child, who could, even after the estate had been distributed, use the *condictio indebiti* to claim maintenance from an heir or legatee to whom payment of estate assets had been made in terms of a valid distribution of the estate.⁶⁴⁹ It felt that this was a drastic measure that could be prejudicial to an heir or legatee, but was justifiable in the context of a needy minor.⁶⁵⁰ It could, however,

⁶⁴³ Par 6.16.

⁶⁴⁴ Par 6.17.

⁶⁴⁵ Par 6.20.

⁶⁴⁶ Par 6.20.

⁶⁴⁷ Par 6.21.

⁶⁴⁸ Par 6.23.

⁶⁴⁹ *Bank v Sussman* 1968 (2) SA 15 (O) 17; *Couper v Flynn* 1975 (1) SA 778 (R) 779.

⁶⁵⁰ Par 6.24.

not find the same justification for its application in the case of a needy surviving spouse, and accordingly concluded that where the surviving spouse unreasonably delayed the lodging of a claim, he or she probably did not have a serious need for support and should not be able to claim from the heirs or legatees.⁶⁵¹ Even where the need for support might arise only after the death of the first-dying spouse, principles of legal certainty and equity meant that the survivor should not be able to claim from the heirs or legatees to whom a valid distribution had been made. The Commission therefore suggested that legislation should provide that the surviving spouse had no right of recourse against anyone to whom estate assets were given in terms of a valid distribution of the estate;⁶⁵²

- The question of discharge of the claim was also considered.⁶⁵³ Some commentators had suggested that it be settled by a capital amount – the advantage of this was that it would eliminate administrative problems and delays. Other commentators suggested periodical payments – the advantage was that payments could be adjusted as the survivor's maintenance needs changed. The Commission was of the opinion⁶⁵⁴ that the legislature should not prescribe any particular way to settle the claim and should leave a wide discretion so that the parties could negotiate the settlement method.

The Report included a draft Bill setting out the above considerations. It was however only in 1990 that a Bill on the Maintenance of Surviving Spouses⁶⁵⁵ was presented to Parliament. After the Bill was amended,⁶⁵⁶ it was tabled in Parliament and assented to on 23 March 1990. With the exception of two amendments made in 1992 and 2009

⁶⁵¹ Par 6.23.

⁶⁵² Par 6.25.

⁶⁵³ Par 6.27.

⁶⁵⁴ Par 6.28.

⁶⁵⁵ W86-88 (AS).

⁶⁵⁶ W2-90 (AS).

respectively,⁶⁵⁷ the MSSA Act as we know it today is still the same as the version that was assented to. It was promulgated in Government Gazette 12390 of 4 April 1990 and commenced on 1 July 1990.

3.5 Conclusion

The provision of maintenance for a surviving spouse after the death of his or her spouse was something that the Roman and Roman-Dutch legal systems grappled with, and this lack of certainty spilled over into South African law. The legislative process to address this started as far back as 1965, but several attempts to introduce legislation stalled. My research shows that the main reason for the resistance to the introduction of a duty of maintenance was the view that spouses were free to choose a matrimonial property regime that was not prejudicial to them and that disinheritance of the surviving spouse was the exception to the rule. Introducing legislation to address such exceptions would encroach on the established principle of freedom of testation and was therefore not desirable. It was only when it became clear that legislation should focus on the duty of maintenance that the legislative process gained some momentum. In the next chapter I will consider the provisions of the MSSA to determine to what extent it achieves what the Law Commission had in mind when considering the basis for a maintenance claim.

⁶⁵⁷ See 4.1 for details of the changes.

CHAPTER 4

THE MAINTENANCE OF SURVIVING SPOUSES ACT 27 OF 1990

4.1 Introduction

The MSSA came into operation on 1 July 1990 and applies to marriages that end in death after that date.⁶⁵⁸ It is not entirely clear from the Parliamentary debates⁶⁵⁹ why it took so long for Parliament to adopt the legislation. On the one hand it appears that there initially was a general view that such legislation was not necessary. Many marriages were in community of property, and it was considered that the introduction of the accrual regime in 1984 would provide spouses in a marriage out of community of property with protection on dissolution of the marriage. It was therefore anticipated that the incidence of destitute spouses would become less and less. On the other hand, there was a growing acknowledgment that spouses who had entered into a marriage out of community of property before 1984 might need protection on the death of one of the spouses, especially considering that protection was extended to spouses on divorce. It is also evident that there was a growing understanding of the need for constitutional and social reform that could be of benefit to the community at large.

Since its operational date, only two amendments have been made. In 1992 the Estate Affairs Amendment Act⁶⁶⁰ effected a change to section 2(3)(d)⁶⁶¹ and in 2009 the Reform of Customary Law of Succession and Related Matters Act 11 of 2009 (hereinafter referred to as the “RCLSA”) effected a change to the definition of “survivor”.⁶⁶² Apart from these two amendments, the MSSA is still in the same form as it was when it was first promulgated approximately 30 years ago.

⁶⁵⁸ Proclamation R110, 1990 dated 29 June 1990.

⁶⁵⁹ Debates of Parliament, Second session, Ninth Parliament 8 March 1990.

⁶⁶⁰ 1 of 1992.

⁶⁶¹ See 4.4.3 for more details.

⁶⁶² See 4.3.5 and 5.1 to 5.3 for a detailed discussion of “spouse” and “survivor”.

The preamble to the MSSA states that its object is to provide the surviving spouse with a claim for maintenance against the estate of the deceased spouse in certain circumstances, and to provide for incidental matters. As explained in the Memorandum on the objects of the Bill,⁶⁶³ the “norms of society demand that a surviving spouse should not be left destitute if the estate of the deceased spouse is able to provide maintenance”. Costa⁶⁶⁴ expresses the view that the principle of providing for the reasonable maintenance needs of the surviving spouse as far as he or she is unable to provide for those needs from own means and earnings, is “reformatory and equitable”, as it is illogical to disallow the continuance of a duty of support that existed during the marriage after the death of one of the spouses, in circumstances where the survivor needs support and where the estate of the deceased is in a position to provide such support. He quotes⁶⁶⁵ William Porter, the Attorney-General of the Cape in 1859, who stated: “I desire that a husband whose dinner is not cooked to his liking shall not be at liberty, leaving a large fortune, to leave his wife nothing”.

As mentioned before,⁶⁶⁶ the common law provided that the duty of support owed by spouses to each other came to an end when the relationship terminated.⁶⁶⁷ In the previous chapter I discussed the legislative process to address this, culminating in the MSSA. In *Kruger v Goss*⁶⁶⁸ the court confirmed⁶⁶⁹ that the MSSA amounts to limited intervention in this common law rule and alters it only to the extent provided in the MSSA. It has been said⁶⁷⁰ that, while it may be legally possible to disinherit a spouse, it is

⁶⁶³ B 86-88 and B2-90.

⁶⁶⁴ “Commentary on Maintenance of Surviving Spouses Act 27 of 1990 (‘The Act’)” 1990(272) *De Rebus* 533.

⁶⁶⁵ 1990(272) *De Rebus* 533.

⁶⁶⁶ See 3.4.2.2.

⁶⁶⁷ *Ex parte Standard Bank Ltd* 1978 (3) SA 323 (R); *Kruger v Goss* 2010 (2) SA 507 (SCA); Sonnekus 2010-3 TSAR 632.

⁶⁶⁸ 2010 (2) SA 507 (SCA).

⁶⁶⁹ At par 11.

⁶⁷⁰ Curlewis “Rehabilitative maintenance” 2010(495) *De Rebus* 26; Roux “Freedom of testation: can a person disinherit a spouse?” 2013(536) *De Rebus* 225.

debatable whether it is morally acceptable. In order to consider this further, it is necessary to consider the provisions of the MSSA.

4.2 The MSSA

The MSSA is short and consists of only four sections. The three sections of relevance⁶⁷¹ deal with definitions,⁶⁷² details of the maintenance claim, how it is to be dealt with,⁶⁷³ and guidelines to the executor on how to determine reasonable maintenance needs.⁶⁷⁴

The relevant sections read as follows:

1. Definitions —In this Act, unless the context otherwise indicates—

“court” means a court as defined in section 1 of the Administration of Estates Act, 1965 (Act No. 66 of 1965);

“executor” means an executor as defined in section 1 of the Administration of Estates Act, 1965, or any person who liquidates and distributes an estate on the instructions of the Master;

“Master” means a Master as defined in section 1 of the Administration of Estates Act, 1965;

“own means” includes any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse;

“survivor” means the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)).

2. Claim for maintenance against estate of deceased spouse

- (1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.

⁶⁷¹ Section 4 merely deals with the title and the operational date of the MSSA and will therefore not be discussed in this thesis.

⁶⁷² Section 1.

⁶⁷³ Section 2.

⁶⁷⁴ Section 3.

- (2) The survivor shall, in respect of a claim for maintenance, not have a right of recourse against any person to whom money or property has been paid, delivered or transferred in terms of section 34 (11) or 35 (12) of the Administration of Estates Act, 1965 (Act No. 66 of 1965), or pursuant to an instruction of the Master in terms of section 18 (3) or 25 (1) (a) (ii) of that Act.
- (3) (a) The proof and disposal of a claim for maintenance of the survivor shall, subject to paragraphs (b), (c) and (d), be dealt with in accordance with the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965).
 - (b) The claim for maintenance of the survivor shall have the same order of preference in respect of other claims against the estate of the deceased spouse as a claim for maintenance of a dependent child of the deceased spouse has or would have against the estate if there were such a claim, and, if the claim of the survivor and that of a dependent child compete with each other, those claims shall, if necessary, be reduced proportionately.
 - (c) In the event of a conflict between the interests of the survivor in his capacity as claimant against the estate of the deceased spouse and the interests in his capacity as guardian of a minor dependent child of the deceased spouse, the Master may defer the claim for maintenance until such time as the court has decided on the claim.
 - (d) The executor of the estate of a deceased spouse shall have the power to enter into an agreement with the survivor and the heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the survivor or the trust, or to impose an obligation on an heir or legatee, in settlement of the claim of the survivor or part thereof.

3. Determination of reasonable maintenance needs

In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:

- (a) the amount in the estate of the deceased spouse available for distribution to heirs and legatees;
- (b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and
- (c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse.

4.3 Definitions

As can be seen above, section 1 of the MSSA contains only five definitions.

4.3.1 "Court"

The definition refers to a court as defined in section 1 of the Estates Act. The latter Act defines a court as the High Court having jurisdiction, or any judge thereof. In terms of

section 4 of that Act, the High Court of the area in which a deceased ordinarily resided at the time of his or her death, shall have jurisdiction over his or her estate.

The only reference in the MSSA to a court is in section 2(3)(c) which deals with the conflict between the interests of the survivor in his or her capacity as claimant against the estate and as guardian of a minor dependent child of the deceased. This aspect is discussed in 4.4.8 below.

4.3.2 “Executor”

This is defined as meaning an executor as defined in section 1 of the Estates Act, or any person who liquidates and distributes an estate on the instruction of the Master.⁶⁷⁵ The Estates Act defines an executor as “any person authorised to act under letters of executorship granted or signed and sealed by a Master or under an endorsement made under section 15”.⁶⁷⁶

Where an estate does not exceed R250 000, the Master has the discretion to dispense with the appointment of an executor and to give directions to any person regarding the manner in which the estate shall be liquidated and distributed.⁶⁷⁷ The wording of the definition of executor in the MSSA makes it clear that, should such an instance arise, the person who was authorised by the Master to liquidate and distribute the estate, is empowered to deal with a maintenance claim in terms of the MSSA as he or she receives the instruction for the liquidation and distribution of the estate from the Master.

⁶⁷⁵ The position and role of the executor are discussed in detail in 2.2 to 2.5.

⁶⁷⁶ The reference to “signed and sealed” refers to the process whereby letters of executorship granted in another country are processed by the Master so that the executor is deemed to be an executor to whom letters of executorship were granted by the Master. The reference to section 15 is to a scenario where the Master endorses the appointment of an assumed executor on the letters of executorship.

⁶⁷⁷ Section 18(3) of the Estates Act read with Regulation 920 in Government Gazette 38238, 24 November 2014.

4.3.3 “Master”

Section 1 provides that the Master is as defined in section 1 of the Estates Act. The latter Act provides that the Master “in relation to any matter, property or estate, means the Master, Deputy Master or Assistant Master of a High Court appointed under section 2, who has jurisdiction in respect of that matter, property or estate and who is subject to the control, direction and supervision of the Chief Master”. The only references in the MSSA to the Master are in section 2(2)⁶⁷⁸ and 2(3)(c).⁶⁷⁹

4.3.4 “Own means”

This is defined as “[including] any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise from the death of the deceased spouse.”

The reference to matrimonial property law means that the survivor’s undivided half share of a joint estate where the marriage was in community of property, or the survivor’s share of the accrual of the deceased spouse’s estate where the marriage was subject to the accrual system, is included in his or her own means.⁶⁸⁰ Any inheritance from the deceased spouse’s estate also qualifies as the survivor’s own means. The definition is wide enough to also encompass benefits that flow to the survivor outside of the estate, for example pension benefits, the proceeds of a retirement annuity or the proceeds of life insurance that is paid to the spouse as beneficiary in terms of a nomination by the deceased spouse.⁶⁸¹

⁶⁷⁸ See 4.3.2.

⁶⁷⁹ See 4.3.1 and 4.4.6.

⁶⁸⁰ Heaton & Kruger *South African family law* (2015) 117.

⁶⁸¹ Abrie *et al* 114; Meyerowitz 15.79A.

In *Feldman v Oshry*⁶⁸² the court had to consider whether voluntary contributions by a third party to the surviving spouse constituted own means. Lionel Feldman died on 3 May 2005. He had been married to his wife, Marjorie, for approximately eighteen years and the marriage was out of community. In his will he bequeathed R150 000 to Marjorie and the residue of his estate to his children from a previous marriage. His daughter and son-in-law were appointed as executors of his estate. Mrs Feldman averred that she derived her maintenance support from the late Mr Feldman and lodged a claim for maintenance of approximately R670 000 in terms of the MSSA against his estate. When the executors rejected the claim, Mrs Feldman approached the court for assistance. The High Court started by looking⁶⁸³ at the definition of “own means”. It held that the reference to “include” in the definition means that any other means possessed by the claimant should also be taken into account. The court also considered the term “means” and referred to *The new shorter Oxford English dictionary* which defines⁶⁸⁴ “means” as

“includes an instrument, agency, method or course of action by which some object is or may be attained, or some result may be brought about. Also, the resources available for effecting some object, especially financial resources in relation to the requirements of expenditure and includes money and wealth”.

The court also referred to *The standard dictionary of the English language Vol II* which includes⁶⁸⁵ money or property “as a procuring medium, available resources, a measure and a plan, method or procedure”, amongst the meanings of “means”.⁶⁸⁶ The judge summarised⁶⁸⁷ that “means” would also refer to the ability to achieve an object such as reasonable maintenance. The court concluded⁶⁸⁸ that a consideration of the applicant’s assets indicated that she would be unable to maintain a lifestyle similar to that which

⁶⁸² [2009] JOL 23442 (KZD).

⁶⁸³ At 11.

⁶⁸⁴ (1993) at 1724.

⁶⁸⁵ (1901) at 1094.

⁶⁸⁶ I find the definition in the *Oxford dictionary of current English* much clearer – it defines “means” at 561 as “a thing or method for achieving a result”, “money” or “wealth”.

⁶⁸⁷ At 12.

⁶⁸⁸ At 12.

she enjoyed during her marriage, and that the only reason for her managing to maintain herself was because her sons in America contributed to her monthly maintenance.

The question therefore arose whether the sons' voluntary contributions to their mother's maintenance should be taken into account when calculating her means. In terms of our common law, parents and children have a reciprocal duty of support.⁶⁸⁹ However, the child's duty of support is subject to the rule that the parent must first claim support from his or her nearest relatives, including his or her spouse.⁶⁹⁰ Our law furthermore provides that the child's duty of support can only arise if the parent is indigent and the child is able to support the parent.⁶⁹¹ The *Oxford dictionary of current English*⁶⁹² defines⁶⁹³ "indigent" as "very poor". In *Smith v Mutual & Federal Insurance Co Ltd* it was held⁶⁹⁴ that to be indigent means to be in extreme need or want of the basic necessities of life. In *Fosi v Road Accident Fund*⁶⁹⁵ it was held⁶⁹⁶ that the deciding principle is whether a person can prove that he or she is dependent on a third party's contributions for the "necessities of life". The latter concept in turn depends on the person's station in life. The judge in *Feldman v Oshry*⁶⁹⁷ was of the opinion⁶⁹⁸ that the reference in sections 2(1) and 3 of the MSSA to "reasonable" maintenance needs indicates a more restrictive or conservative approach, as this would be consistent with the legislature's intention of limiting the encroachment on the common law position that the maintenance obligation between spouses comes to an end when the marriage

⁶⁸⁹ Heaton & Kruger 310; Skelton & Carnelley (eds) 348; Heaton "Family law" 2010(1) *Annual Survey of South African Law* 459; *LAWSA* vol 16(2) "Marriage" 209.

⁶⁹⁰ *Ex parte Pienaar* 1964 (1) SA 600 (T); *Manuel v African Guarantee & Indemnity Co Ltd* 1967 (2) SA 417 (R); *Barnes v Union and South West Africa Insurance Co Ltd* 1977 (3) SA 502 (E); *Tyali v University of Transkei* [2002] 2 All SA 47 (Tk); Heaton & Kruger 310; *LAWSA* vol 16(2) "Marriage" 213.

⁶⁹¹ *Oosthuizen v Stanley* 1938 AD 322; *Caldwell v Erasmus* 1952 (4) SA 43 (T); *Singh v Santam Insurance Co* 1974 (4) SA 196 (D); *Smith v Mutual & Federal Insurance Co Ltd* 1998 (4) SA 626 (C); Heaton & Kruger 310; Skelton & Carnelley (eds) 355; Heaton 2010(1) *Annual Survey of South African Law* 459; *LAWSA* vol 16(2) "Marriage" 209.

⁶⁹² Soanes 2006.

⁶⁹³ At 463.

⁶⁹⁴ At 632.

⁶⁹⁵ 2008 (3) SA 560 (C).

⁶⁹⁶ At par 13.

⁶⁹⁷ [2009] JOL 23442 (KZD).

⁶⁹⁸ At 17.

dissolves.⁶⁹⁹ The executors contended that the deceased had during the marriage indicated that Mrs Feldman's sons should assume responsibility for her after his death and that this effectively meant that she could rely on their contributions. The judge held⁷⁰⁰ that this did not absolve the estate from a lawful liability imposed on it by the MSSA, provided of course that Mrs Feldman did qualify for such assistance. Despite calling for a restrictive approach, the court nevertheless held⁷⁰¹ that the voluntary contribution by Mrs Feldman's sons should not be included as her own means as it could come to an end at any time. The judge's finding is in line with the common law rule referred to above, as Mrs Feldman's children would only be obliged to support her if her nearest relative, in this case her spouse (and, after his death, his estate,) was not in a position to do so.

The executors in the estate did not accept the court's decision and took the matter on appeal.⁷⁰² They claimed that Mrs Feldman had not established a need for maintenance as the maintenance paid by her sons meant that she was not in need. They also contended that the sons were likely to continue contributing to their mother's maintenance needs. The Supreme Court of Appeal reconfirmed⁷⁰³ that the reciprocal duty of support between spouses is one of the invariable consequences of marriage and that, where one of the spouses is indigent and the other spouse does not have the means to meet such duty of support, the indigent spouse may look to a child for support. The court referred⁷⁰⁴ to *Oosthuizen v Stanley*⁷⁰⁵ where it was held that the question whether a spouse does not have the means to support the other spouse is a question of fact depending on the circumstances of each case. The court further referred to *Manuel v African Guarantee and Indemnity Co Ltd*⁷⁰⁶ where it was held that,

⁶⁹⁹ At 17.

⁷⁰⁰ At 18.

⁷⁰¹ At 17.

⁷⁰² *Oshry v Feldman* [2011] 1 All SA 124 (SCA).

⁷⁰³ At 130.

⁷⁰⁴ At 130.

⁷⁰⁵ 1938 AD 322.

⁷⁰⁶ 1967 (2) SA 417 (R).

where a husband has the means to support his wife, she can only expect support from her child if she can convince the court that she has taken all reasonable steps to enforce her rights against her husband. The court held⁷⁰⁷ that Mr Feldman would not during his life have been able to insist that Mrs Feldman's sons maintain her if he himself had the means to do so, and this principle would extend to his estate. It held⁷⁰⁸ that the principles underlying the MSSA were in line with constitutional values and norms, specifically the ones aimed at protecting the dignity of the individual, as the MSSA was intended to ensure that the primary obligation of a spouse who owed a duty of support to his or her spouse, would continue after his or her death. It held further⁷⁰⁹ that if the provisions of the MSSA were interpreted in such a way that the surviving spouse had to depend on the "largesse" or generosity of others, it would defeat the purpose of the MSSA. The court accordingly confirmed⁷¹⁰ that the contribution made by Mrs Feldman's sons could not be regarded as her own existing and prospective means.

Another question that arises is the extent to which a surviving spouse's capital assets should be considered when determining his or her means. Working Paper 13⁷¹¹ issued by the Law Commission as part of its project to address the surviving spouse's need for maintenance stated⁷¹² that the capital of the survivor should be exhausted before it could be said that a need for support exists. If this was to be the case, it could mean that the executor could compel the survivor to sell his or her non-income generating assets in order to utilise the proceeds either for his or her maintenance needs or to re-invest it so as to generate income to cover such needs. The Report⁷¹³ issued by the Law Commission, however, did not include exhaustion of the surviving spouse's capital

⁷⁰⁷ At 134.

⁷⁰⁸ At 134.

⁷⁰⁹ At 134.

⁷¹⁰ At 134.

⁷¹¹ South African Law Commission *Working Paper 13 Review of the law of succession: the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse* Project 22 Pretoria, 1986.

⁷¹² Par 6.5 at page 24.

⁷¹³ South African Law Commission *Report Review of the law of succession: the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse* Project 22 Pretoria, 1987.

assets as a requirement and merely stated⁷¹⁴ that the capital of the surviving spouse should be taken into account when establishing whether he or she needed support. In *Feldman v Oshry*⁷¹⁵ the High Court held⁷¹⁶ that forcing Mrs Feldman to liquidate assets such as the immovable property she owned or her car, in order to generate funds for living expenses, would expose her to risk and insecurity. As the judge pointed out,⁷¹⁷ even if she did sell those assets, the proceeds would in any event be insufficient to maintain her for the expected duration of her life. The court in *Seidel v Lipschitz*⁷¹⁸ also suggested⁷¹⁹ that the survivor's means include his or her capital assets.

In *Oshry v Feldman*⁷²⁰ the Supreme Court of Appeal did not discuss this aspect at all. Sonnekus,⁷²¹ in his discussion of the case, is of the opinion that the survivor cannot claim to be in need of maintenance merely because his or her capital no longer produces sufficient income. He suggests that the legislature could not have intended that the survivor's capital or immovable property should remain intact. He suggests⁷²² that the court should have taken into account Mrs Feldman's immovable property when considering her means and that the court failed to give reasons for not doing so.⁷²³ He argues⁷²⁴ that the court's reference to the provisions of the MSSA having to be "construed in accordance with constitutional norms and values" does not mean that the express provisions of the MSSA can be negated. At first glance it appears that Sonnekus is implying that the survivor should be forced to sell his or her assets in order to obtain funds which could be used for maintenance or could generate income. I do not agree that this would necessarily be feasible, as it could well be that the costs of maintaining

⁷¹⁴ Par 6.5 at page 27.

⁷¹⁵ [2009] JOL 23442 (KZD).

⁷¹⁶ At 20.

⁷¹⁷ At 20.

⁷¹⁸ Unreported, case number 24960/11 [2103] ZAWCHC 158, judgment delivered on 24 October 2013.

⁷¹⁹ At par 26.

⁷²⁰ [2011] 1 All SA 124 (SCA).

⁷²¹ "Verlengde onderhoudsaanspraak vir langselewende gade geen onbedagte meevaller vir erfgename van aanspraakmaker nie" 2010-4 TSAR 810.

⁷²² 2010-4 TSAR 817.

⁷²³ 2010-4 TSAR 819.

⁷²⁴ 2010-4 TSAR 816.

the immovable property would be less than if the property was sold with the survivor using the proceeds of the sale to pay rent elsewhere.⁷²⁵ Sonnekus⁷²⁶ however clarifies⁷²⁷ that he is not advocating a forced sale of assets, but suggests that it could not be said that someone who owns unencumbered immovable property is in need of maintenance, as the property has intrinsic value that should be considered. He suggests⁷²⁸ that the survivor in such a scenario could encumber his or her property with a mortgage bond issued by a bank in order to borrow enough money to provide for his or her maintenance needs. The bond could be issued on the basis that the interest rolls up so that the capital amount of the loan and interest only becomes repayable on the death of the lender (the survivor) and the lender therefore does not have to repay the bond on a monthly basis. The benefit of such an arrangement is that the bank will have a preferred claim against the estate of the deceased lender. Sonnekus suggests⁷²⁹ that this means that the lack of income of the surviving spouse will not be an impediment for the bank when granting the bond. The transaction can also not be regarded as reckless lending⁷³⁰ in conflict with the provisions of the National Credit Act.⁷³¹ He suggests⁷³² that this proposed construction offers a good alternative to forcing the survivor to sell his or her asset, and it is strange that there is no indication that the court even considered this as an option.

While I agree with Sonnekus' view that the immovable property cannot merely be disregarded when determining the survivor's needs, it appears unlikely that a retail bank will grant a mortgage bond to the surviving spouse. In my discussions with

⁷²⁵ See also the court's comments in *Feldman v Oshry* [2009] JOL 23442 (KZD) at 20 in this regard.

⁷²⁶ 2010-4 TSAR 817.

⁷²⁷ 2010-4 TSAR 818.

⁷²⁸ 2010-4 TSAR 818.

⁷²⁹ 2010-4 TSAR 818.

⁷³⁰ *National Credit Regulator v Nedbank Limited* [2009] 4 All SA 505 (GNP).

⁷³¹ 34 of 2005.

⁷³² 2010-4 TSAR 819.

mortgage/home loan divisions at the four major banks,⁷³³ I have been advised that banks consider two aspects when considering an application for a mortgage bond:

- the amount of the loan compared to the value of the property; and
- whether the applicant has the means to service the bond.

All four banks indicated that, although the value of the property is an important factor, the overriding consideration is whether the applicant has the ability to meet the obligations under the requested mortgage bond. It is my contention that a surviving spouse who does not have the means to provide for his or her own maintenance needs is unlikely to be able to service a bond, or for that matter, maintain the property. I therefore fail to see the likelihood of a bank granting a mortgage bond to a person whose only asset of significance is a house and who does not have sufficient income to service the bond. The discussions have also revealed that banks are not keen to grant bonds where the interest is rolled up and only becomes payable when settlement of the bond falls due, as suggested by Sonnekus. The main reason advanced for this is the fact that there is significant risk for the bank in such a scenario – the property could deteriorate due to a lack of maintenance (as a result of a lack of income), which could lead to a situation where the mortgagee owes more on the bond than the property is worth. In addition, the credit situation of the mortgagee may be such that he or she obtains other forms of credit and this could result in an insolvent estate on death, which leaves the bank exposed to risk.

While I therefore do not support Sonnekus' suggestion of a mortgage bond over the surviving spouse's property, I agree with his comments that the property cannot simply be disregarded. It is my submission that the income generating potential and/or credit worthiness of the survivor's assets must be considered when determining his or her own means, as that would be in line with the principles behind the MSSA.

⁷³³ ABSA, First National Bank, Nedbank and Standard Bank.

4.3.5 “Survivor”

This is defined as meaning “the surviving spouse in a marriage dissolved by death and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929..., but before 2 December 1988 ...”.

When the MSSA was promulgated it simply provided for a spouse in a marriage dissolved by death. As any reference to “marriage” in our law traditionally was to a civil marriage solemnised in terms of the Marriage Act,⁷³⁴ this definition excluded customary marriages.⁷³⁵ Our courts did, however, as far back as 2007 hold that this discriminated against parties in a customary marriage and in *Kambule v Master of the High Court*⁷³⁶ the court held that, as there was no room for a discriminatory interpretation, a surviving partner to a valid customary marriage which is recognised in terms of the RCMA as a marriage “for all purposes” must be recognised as a spouse for purposes of section 2(1) of the MSSA.

In 2009 the RCLSA was promulgated. The memorandum on the objects of this Act stated that its purpose was “to abolish the customary rule of primogeniture in as far as it applies to the law of succession in order to bring it in line with the Constitution; and to give effect to the judgment of the Constitutional Court in the case of *Bhe v The Magistrate, Khayelitsha* CCT 49/03, *Shibi v Sithole* CCT 69/03, which declared the principle of male primogeniture incompatible with the Bill of Rights”. While this Act deals mainly with succession law and property rights in relation to customary marriages, section 8 provides for the amendment of certain laws, one of which is the MSSA. The definition of “survivor” in section 1 of the MSSA was accordingly amended to include “a spouse of a customary marriage which was dissolved by a civil marriage contracted by

⁷³⁴ 25 of 1961.

⁷³⁵ See 5.1 for a more detailed discussion.

⁷³⁶ [2007] 4 All SA 898 (E).

her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act 3 of 1988))". As Du Toit points out,⁷³⁷ the amendment confirms the protection given to the so-called "discarded spouse" by section 1(f) of the Marriage and Matrimonial Property Law Amendment Act.⁷³⁸ The latter section provides that where a husband in a customary union, after the commencement of the Black Administration Act, but before the commencement of the Marriage and Matrimonial Property Law Amendment Act, enters into a marriage with any woman other than his partner in the customary union, such marriage would not affect the material rights of the partner in the customary union or any children born from that union. In addition, the widow and children of the marriage would have no greater rights in respect of the deceased spouse's estates than she would have had if the marriage had been a customary union. This measure therefore protects the partner in the customary union and the amendment to the MSSA means that it now gives the same protection to the partner in the customary union.

The enhanced definition of "survivor" in section 1 of the MSSA has been effective since 20 September 2010. The effect of the amendment is that a surviving spouse in a customary marriage can lodge a claim for reasonable maintenance needs against the estate of a deceased spouse. If the deceased was a party to multiple customary marriages at the time of his death, the presence of several wives would be relevant when determining each wife's reasonable maintenance needs. If the estate does not have sufficient means to meet all the claims, the claims will be reduced proportionately.⁷³⁹

⁷³⁷ "The constitutional family in the law of succession" 2009(126)3 *SALJ* 478.

⁷³⁸ 3 of 1988.

⁷³⁹ Heaton & Kruger 234; see also 4.4.7 for more details.

The definition of “survivor” in the MSSA has created many problems when dealing with the different types of family relationships that exist in South Africa, especially those relationships that are not recognised in our law as valid marriages or relationships that are worthy of protection. This aspect will be discussed in more detail in chapter 5.

4.4 The claim

4.4.1 Determining whether a claim exists

In *Jewaskewitz v Master of the High Court Polekwane* (sic)⁷⁴⁰ the court held that there is a two-legged approach to the maintenance claim. The first question is whether the claimant is legally entitled to claim for maintenance against the estate.⁷⁴¹ The court held⁷⁴² that this question would be answered in the affirmative if the claimant was married to the deceased and the marriage subsisted at the time of the deceased’s death.⁷⁴³ This means that even where the spouses were separated but not divorced, the surviving spouse would be legally entitled to claim for maintenance. The second question is whether the claimant in the circumstances is factually entitled to claim maintenance.⁷⁴⁴ This question would require applying the factors listed in section 3 of the MSSA to the relevant facts of each case.⁷⁴⁵

It is important to note that the maintenance claim arises irrespective of the matrimonial property regime that applied to the spouses’ marriage.⁷⁴⁶ The Law Commission initially

⁷⁴⁰ Unreported, case number 53514/2012 [2013] ZAGPPHC 118, judgment delivered on 16 May 2013.

⁷⁴¹ At par 11.

⁷⁴² At par 11.

⁷⁴³ As referred to above in 4.3.5, the meaning of “married” and “marriage” often causes problems when dealing with relationships that are akin to marriage, but not recognised as such in our law, for example marriages in terms of Muslim or Hindu rites, same-sex partners who are in a marital type relationship and heterosexual partners in a marital type relationship. This issue will be discussed in detail in 5.2 and 5.3.

⁷⁴⁴ At par 12.

⁷⁴⁵ At par 13.

⁷⁴⁶ Heaton & Kruger 117.

identified⁷⁴⁷ a need for legal intervention only in instances where parties were married out of community of property with no community of profit or loss or application of the accrual system, and the surviving spouse was disinherited by the first-dying spouse. However, it noted⁷⁴⁸ in its Report that it was desirable to allow a claim for maintenance regardless of the matrimonial property regime that applies to the marriage. The MSSA accordingly applies to all marriages regardless of the applicable matrimonial property regime⁷⁴⁹ and it also does not require the spouse being disinherited – the important requirement is that the survivor is not capable of providing for his or her maintenance needs from own means and earnings.⁷⁵⁰ The absence of a requirement of disinheritance therefore means that the MSSA applies to both testate and intestate estates.⁷⁵¹

The nature of the matrimonial property regime will of course have an impact on the existence or not and the *quantum* of a maintenance claim. Where the spouses were married in community of property, their assets form part of a joint estate and the spouses are co-owners in indivisible half shares of all the assets and liabilities they acquire during the marriage.⁷⁵² At the death of the first-dying spouse, the liabilities are settled from the joint estate and half of the balance of the joint estate retained by the surviving spouse.⁷⁵³ This right to an undivided half share would therefore form part of the surviving spouse's own means and could result in the spouse having sufficient means to provide for his or her own needs. Even if he or she does not have sufficient means despite retaining the undivided half share, the share that he or she retains will have an impact on the *quantum* of the claim for maintenance needs.

⁷⁴⁷ Sonnekus 1990-3 TSAR 501.

⁷⁴⁸ Par 6.3.

⁷⁴⁹ Heaton & Kruger 117.

⁷⁵⁰ Section 2(1).

⁷⁵¹ Heaton & Kruger 117.

⁷⁵² *Estate Sayle v CIR* 1945 AD 88; *De Wet v Jurgens* 1970 (3) SA 38 (A); *Du Plessis v Pienaar* 2003 (1) SA 671 (SCA); *Corporate Liquidators (Pty) Ltd v Wiggill* 2007 (2) SA 520 (T); *Zulu v Zulu* 2008 (4) SA 12 (D); *Mazibuko v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA); Heaton & Kruger 62.

⁷⁵³ Abrie *et al* 125; Heaton & Kruger 62; Skelton & Carnelley (eds) 120.

Where the spouses were married out of community of property with the accrual system, the spouse with the smaller accrual on dissolution of the marriage acquires a claim against the other spouse for an amount equal to half of the difference between the accrual in the spouses' respective estates.⁷⁵⁴ Where the marriage is dissolved by death, the survivor might, depending on the circumstances, be entitled to an accrual claim against the estate of the deceased spouse. Such accrual claim will be relevant when determining the survivor's own means. The circumstances could, however, be such that the survivor is the spouse whose estate had the bigger accrual, which would expose his or her estate to an accrual claim by the estate of the deceased spouse and this would also have an effect (albeit negatively) on the survivor's own means. It is theoretically possible that the accrual claim by the deceased estate could have such an impact on the survivor's estate that, after settling it, he or she does not have the means to maintain him- or herself, which could result in a maintenance claim against the deceased estate.

As mentioned above, the maintenance claim arises irrespective of whether the deceased made provision for an inheritance for the surviving spouse.⁷⁵⁵ As seen in 4.2, section 2(1) of the MSSA provides that the survivor shall have a claim **if he or she cannot provide for his or her own reasonable maintenance needs from his or her own means** (my emphasis). No reference is made to disinheritance being the basis for the claim. In the Report of the Law Commission it was mentioned⁷⁵⁶ that a need for support mostly occurs where the deceased did not provide for the surviving spouse in a will and the parties were married out of community of property without the accrual system. It was, however, noted⁷⁵⁷ that there could still be a need for support where the parties were married in terms of another matrimonial property regime, albeit in exceptional cases only. The use of the word "mostly" and the reference to "exceptional cases" indicate to

⁷⁵⁴ Section 3 of the Matrimonial Property Act 88 of 1984.

⁷⁵⁵ Heaton & Kruger 117; Sonnekus 1990-3 TSAR 501; Sonnekus 2010-4 TSAR 808.

⁷⁵⁶ Par 6.3.

⁷⁵⁷ Par 6.3.

me that the Commission was mindful of the fact that there could be other scenarios where the surviving spouse is not disinherited but is still unable to maintain him- or herself. Having dealt with the administration of deceased estates, I am of the view that such instances are not that exceptional, as the nature of the parties' respective estates and the assets comprising any inheritance may still have an impact on the claim. A practical example of such a scenario would be where B and C are married out of community of property without the accrual system. B dies, leaving an estate of R2 million, consisting of the family home valued at R1.5 million, some shares, furniture and investments. In his will he leaves the family home to C and the residue of his estate to his children. C has no significant assets of her own. While she inherits the major part of B's estate, it is evident that the inheritance will not place her in a position where she can maintain herself and the property. The fact that she inherits the property therefore does not necessarily mean that she now has sufficient means to fund her own maintenance needs.

A marriage out of community of property subject to the accrual system is also not a guarantee that the survivor will be able to maintain him- or herself. This can be illustrated by using the same facts as above but changing the marriage to one out of community of property subject to the accrual system. The starting value of B's estate was R1.5 million and that of C's estate was R100 000. B's estate at the time of B's death is R800 000. C's estate therefore had the greater accrual during the marriage and B's estate, despite being the larger in value, will therefore have an accrual claim against C. Based on their respective estate values though, C clearly is in a weaker financial position and may still have maintenance needs she cannot meet from her own means (and even less so if she has to settle the accrual claim by B's estate from her assets). While the accrual system is designed to give the spouses protection, it does not in this scenario leave C in a position where she can maintain herself.

Where the survivor does inherit from the deceased spouse, the *quantum* of the inheritance will have an impact on the survivor's means and will therefore be relevant in determining whether he or she has a maintenance claim and, if so, the *quantum* of the claim.

Clause 2(1) of the Bill on Maintenance of Surviving Spouses⁷⁵⁸ provided that the survivor obtained a claim for an *amount* sufficient to cover his or her reasonable maintenance needs. This wording meant that the claim had to be settled by way of payment of money. This could lead to a situation where the executor would be forced to sell assets of the deceased estate if the estate did not have sufficient cash to settle the claim. The MSSA as promulgated, however, simply refers to a claim against the deceased estate and the executor can therefore, in consultation with the survivor, heirs and legatees, determine how the claim will be settled.⁷⁵⁹ As Sonnekus indicates,⁷⁶⁰ this adapted wording addresses some of the objections against the Bill. If the claim was for an amount, it would in all probability have had to be a lump sum, which would not take into consideration any changes in the circumstance of the surviving spouse, such as his or her remarriage.⁷⁶¹

4.4.2 Determining reasonable maintenance needs

The emphasis in the MSSA is on **reasonable** maintenance needs (my emphasis). It should be clear from this wording that the test is to some extent subjective – what is regarded as reasonable by one person is not necessarily regarded as such by another. I could not find any indication in the Parliamentary debates that Parliament had any specific intention as to the meaning of “reasonable maintenance”. The South African

⁷⁵⁸ W2-90 (AS).

⁷⁵⁹ Sonnekus 1990-3 TSAR 502.

⁷⁶⁰ 1990-3 TSAR 503.

⁷⁶¹ Refer to 4.4.3 for further discussion on this point.

Law Commission⁷⁶² had emphasised that the issue was not the survivor's right to share in the deceased's estate, but his or her need for support. I would suggest that this explains or supports why Parliament chose to refer to "maintenance" as opposed to, for example, "provision". During the Parliamentary debate, one member noted that the provision in the proposed legislation was for "maintenance proper" rather than just a transfer of capital which, should the survivor remarry or die shortly after the capital was received, would perhaps be akin to an inheritance rather than maintenance.

The MSSA provides some assistance in this regard – section 3 provides that certain factors shall be considered when determining the surviving spouse's reasonable maintenance needs, namely:

- The amount available for distribution in the deceased spouse's estate;
- The survivor's existing and expected means, earning capacity, financial needs and obligations;
- The duration (subsistence) of the marriage;
- The survivor's standard of living during the subsistence of the marriage;
- The survivor's age at the time of the deceased's death;
- Any other relevant factor.

These factors were referred to in general during the Parliamentary debates, but there was no detailed discussion, other than to mention that section 3 provided no system of precedence as there is in a court, which means the decision making power is left to the discretion of the executor. I am of the view that the reference to "reasonable maintenance" signifies something more than pure financial need, which is objectively determinable. The reference to "reasonable" indicates a subjective test that requires discretion and interpretation on the part of the person determining reasonableness, which ties in with the comment by Parliament that the executor must use discretion when considering the factors to decide whether the claim is reasonable.

⁷⁶² Refer to 3.4.3 for a detailed discussion.

Most of the factors in section 3 appear logical in determining the survivor's objective need for maintenance and the estate's capacity to provide maintenance. As the duty of support relates also to the other party's ability to provide support, it is clear that the amount available for distribution in the deceased's estate is a key element in determining reasonable maintenance needs. This factor by itself could, however, be problematic. The deceased spouse could for example have created significant liabilities in his or her estate, which would have an impact on the amount available for distribution. It is not inconceivable that a testator could knowingly do this in an attempt to frustrate any potential claim for maintenance by his or her surviving spouse. It is also possible that the deceased spouse could have transferred assets from his or her estate to a trust, ostensibly as an estate planning exercise, but actually as a means to frustrate the surviving spouse's claim for maintenance. Costa⁷⁶³ suggests that the MSSA should be amended to provide that, where the deceased spouse' estate had been substantially reduced during his or her lifetime as a result of steps to protect his or her estate against creditors or to save estate duty, the survivor's claim for maintenance should, in addition to his or her estate, lie also against any family trust and/or family company to which the deceased may have transferred assets as part of the "scheme".

In our law a trust is acknowledged as a separate entity and the assets and liabilities vest in the trustees.⁷⁶⁴ In *Braun v Botha*⁷⁶⁵ it was referred to as "a legal institution *sui generis*". Despite this, there have been a few recent cases in respect of divorce proceedings where the court was asked to consider trust assets when making a redistribution order in terms of section 7(3) of the Divorce Act or when determining the

⁷⁶³ 1990(272) *De Rebus* 534.

⁷⁶⁴ *CIR v MacNeillie's Estate* 1961 (3) SA 833 (A); *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) at par 10. In the case of a so-called *bewind trust*, the trust property (or estate) is in fact owned by the trust beneficiaries, subject to the administration and control of the trustees – see paragraph (b) of the definition of "trust" in section 1 of the Trust Property Control Act 57 of 1988.

⁷⁶⁵ 1984 (2) SA 850 (A).

accrual of a spouse's estate. In *Badenhorst v Badenhorst*⁷⁶⁶ the wife asked the court to include the asset value of an *inter vivos* trust in the personal estate of her husband, as she alleged that the trust was his alter ego. The court found,⁷⁶⁷ on the facts, that the trust was indeed the husband's alter ego as he was in full control of the trust and used it as a vehicle for his business activities. It held⁷⁶⁸ that, but for the trust, ownership in all the trust assets would have vested in the husband and therefore ruled⁷⁶⁹ that the value of the trust assets should be added to the value of the husband's estate when determining the redistribution of assets. In *BC v CC*⁷⁷⁰ the wife also alleged that the trust was the alter ego of her husband and she asked as part of divorce proceedings that the value of the trust assets be considered when determining the accrual in her husband's estate. The husband argued that, although it might be appropriate to consider trust assets for purposes of a redistribution order, it was not appropriate to do so for purposes of calculating the accrual in terms of the Matrimonial Property Act, as the latter Act did not give the court any discretion to do so. The court held⁷⁷¹ that the determination of accrual is not the exercise of a discretion but a factual inquiry into the spouse's financial position and that it can therefore include trust assets. It held that in cases dealing with the lifting of the trust veil it is unnecessary for a party to expressly claim that all or some of the property owned by the trustees of the trust is to be deemed as property in the personal estate of a trustee – if it is proved that a transaction is simulated and that a trust asset is in fact an asset in the personal estate of the trustee, the court is entitled to treat such asset as an asset in the personal estate of the trustee for purposes of considering the accrual.⁷⁷² In *MM v JM*⁷⁷³ a similar situation occurred, but with a different result. The court held that a redistribution order in terms of the Divorce Act is based on what the court deems just. The accrual claim, however, simply

⁷⁶⁶ 2006 (2) SA 255 (SCA).

⁷⁶⁷ At 367.

⁷⁶⁸ At 368.

⁷⁶⁹ At 368.

⁷⁷⁰ 2012 (5) SA 562 (ECP).

⁷⁷¹ At par 9.

⁷⁷² At pars 9, 12 and 13.

⁷⁷³ 2014 (4) SA 384 (KZP).

requires the application of a mathematical formula and the trust assets therefore cannot be included in one of the parties' personal estate. In *RP v DP*⁷⁷⁴ the court, however, agreed with *BC v CC* and held that "piercing the trust veil" is a common law power and not linked to any general discretion a court may have. In *WT v KT*⁷⁷⁵ the parties were married in community of property. The wife alleged that the trust was the alter ego of her husband and asked that the trust assets constitute assets of the communal estate. The court held that it could not include the assets in the communal estate as a court has no discretion when determining proprietary consequences of a marriage in community of property. The court also held that a spouse who is neither a trust beneficiary nor a third party who has transacted with the trust does not have standing to challenge the management of a trust by the other spouse.⁷⁷⁶ In *YB v SB*⁷⁷⁷ the parties were married out of community of property with the accrual system. The wife alleged that certain transactions relating to assets acquired and held by a trust were simulated and that the assets should be added to her husband's estate for purposes of calculating the accrual claim. The court agreed with the finding in *RP v DP* that a court can "pierce the trust's veil" if a trustee (or founder) treats the trust as his alter ego. It accordingly found that, as the husband had treated the trust as his alter ego, certain trust assets were in fact assets of the husband and those assets were taken into account for purposes of calculating the accrual in the husband's estate. In *Van Zyl v Van Zyl*,⁷⁷⁸ the court confirmed⁷⁷⁹ that trusts are "well recognised as permissible vehicles for estate and financial planning". It also held⁷⁸⁰ that a court has no general discretion to disregard the existence of a separate legal entity just because it considers it just or convenient to do so. A court may, however, in exceptional circumstances "lift" or "pierce" the "corporate veil" of the trust and deem the assets of the trust to be those of the individual. One such instance would be where the trust is the alter ego of the

⁷⁷⁴ 2014 (6) SA 243 (ECP).

⁷⁷⁵ 2015 (3) SA 574 (SCA).

⁷⁷⁶ This part of the decision was reversed in *REM v VM* 2017 (3) SA 371 (SCA) – see below.

⁷⁷⁷ 2016 (1) SA 47 (WCC).

⁷⁷⁸ [2014] JOL 31973 (GSJ).

⁷⁷⁹ At 8.

⁷⁸⁰ At 8.

controlling person. The court in this case deemed⁷⁸¹ the trust assets to be those of the husband for all purposes, including a redistribution order.

The issue of taking trust assets into account on divorce has been settled by the Supreme Court of Appeal's judgment in *REM v VM*.⁷⁸² The court in that matter held that trust assets could be taken into account, but there had to be proof that the spouse transferred personal assets into the trust and then dealt with them as if they were his or her own assets with the "fraudulent or dishonest purpose" of avoiding the obligation to properly account for the accrual in his or her estate, so as to evade payment to the other spouse of what was due in terms of the accrual claim.⁷⁸³ I am of the view that, just as section 7(5) of the Divorce Act allows the court to consider "any other factor which should in the opinion of the court be taken into account" when dealing with a redistribution order, the reference in section 3 of the MSSA to "any other factor" would empower the executor to consider trust assets in certain circumstances. As seen in the aforementioned cases though, this can only be done if there is a clear indication that the other spouse used the trust as his or her alter ego with the intent to avoid his or her financial obligations in respect of the marriage (or its termination), and such an investigation is not within the power of the executor. Only a court can pierce the trust veneer, therefore I do not believe that Costa's suggestion is viable.

Some writers⁷⁸⁴ express the opinion that two of the factors in section 3, namely the duration of the marriage and the standard of living during the marriage, do not immediately strike one as being logical. The Bill included in the Law Commission's Working Paper and Report did not contain any factors that should be considered. The Bills presented to Parliament, however, did contain factors,⁷⁸⁵ but neither Bill included the duration of the marriage as a factor. In its Working Paper the Law Commission

⁷⁸¹ At 20.

⁷⁸² 2017 (3) SA 371 (SCA).

⁷⁸³ At 20.

⁷⁸⁴ Notably Costa 1990(272) *De Rebus* 534 and Sonnekus 1990-3 *TSAR* 508.

⁷⁸⁵ Clause 3.

looked at the factors listed in section 7(2) of the Divorce Act which the court must have regard to when making an order for the payment of maintenance and investigated⁷⁸⁶ whether these factors should also be applied when considering a need for maintenance on the death of one of the spouses. One of these factors is the duration of the marriage. The Commission referred⁷⁸⁷ to this factor as introducing a moral judgement into the decision regarding the payment of maintenance. As the underlying principle of the MSSA is to provide for the surviving spouse if he or she has lost his or her source of support, and not to address the survivor's right to share in the estate of the first-dying spouse, factors that necessitate a moral judgement should be avoided and the duration of the marriage should therefore not be taken into account.⁷⁸⁸ In its Report, it also referred to the factors in the Divorce Act and reiterated⁷⁸⁹ that the duration of the marriage should only play a role in so far as it does not introduce a moral judgement into the decision about the survivor's entitlement to maintenance. Sonnekus has a similar view – according to him,⁷⁹⁰ the duration of the marriage relates to the past, whereas the need for maintenance is based on the future. He argues that any strong emphasis on this factor may imply that the survivor is being “compensated” for the years spent in the marriage, which is akin to the provisions of the Divorce Act⁷⁹¹ which allow for compensation to the divorced spouse when a redistribution of the marital assets is contemplated. Any such approach in the context of maintenance is, however, misguided, as the intention behind the MSSA was to provide for proven maintenance needs and not for a redistribution of an equitable portion of the deceased's assets.⁷⁹² Sonnekus suggests⁷⁹³ that, should we accept that the estate would only be liable if the need of the spouse was directly linked to the marriage, it was unlikely that the survivor would be in need of maintenance simply because the marriage was of short duration.

⁷⁸⁶ Par 6.11.

⁷⁸⁷ Par 6.11.

⁷⁸⁸ Par 6.11.

⁷⁸⁹ Par 6.16.

⁷⁹⁰ 1990-3 TSAR 508.

⁷⁹¹ Section 7(3).

⁷⁹² 1990-3 TSAR 508.

⁷⁹³ 1990-3 TSAR 509.

He emphasises though that this does not mean that there will in all cases be a mathematical link between the duration of the marriage and the extent of the estate's maintenance obligation and that the duration of the marriage is therefore merely one factor to be considered. He therefore suggests⁷⁹⁴ that, although the duration of the marriage would play a role, it should only be considered in determining the maintenance obligation of the estate and should have no bearing on the need of the surviving spouse. Costa⁷⁹⁵ also questions the inclusion of the duration of the marriage as a factor and asks whether this means that a survivor whose marriage was of short duration would be entitled to less maintenance, despite his or her reasonable maintenance needs indicating the opposite.

I respectfully submit that Sonnekus' comments are correct, as they tie in with the Law Commission's comment⁷⁹⁶ that the basis of the determination of the maintenance claim is the social norm that requires that a surviving spouse shall not be left without provision, and not the moral right to share in the estate of the first-dying spouse. It is, however, not clear to me how a claim can be assessed without any moral judgement – why would the legislature have included the duration of the marriage as a factor at all if no moral judgement should be made? I would assume that the inclusion thereof as a factor means that more weight will be given to a longer marriage, but if that is the case, does this factor not automatically introduce a moral judgement? It is therefore my view that the duration of the marriage should be taken into consideration as one of the factors mentioned in section 3 and only to the extent that it has a bearing on the maintenance needs of the survivor. It could be argued that the legislature included the duration of the marriage to address those instances where a younger person was married to a rich, older person for a short time so that, when the older spouse died, the survivor did not become entitled to a large amount for maintenance needs purely as a result of the standard of living during the marriage. This would be a valid approach, but

⁷⁹⁴ 1990-3 TSAR 510.

⁷⁹⁵ 1990(272) *De Rebus* 534.

⁷⁹⁶ Par 4.3.

my view remains that the proven maintenance needs should remain the key focus and the standard of living during, and the duration of, the marriage should be relevant only as far as these factors relate to the spouse's maintenance needs. There is nothing in the Parliamentary debate that explains why the duration of the marriage should be included as a factor or how it should be applied when determining the claim.

The Bill contained in the Law Commission's Working Paper included a reference⁷⁹⁷ to the standard of living of the spouses before the dissolution of the marriage. The Bill contained in the Report, however, did not contain such a reference. In dealing with the criteria for determining the amount of maintenance, the Report⁷⁹⁸ confirmed that the maintenance that a party to a marriage can claim during the marriage will depend on the standard of living of the family and a court, when dealing with maintenance in the event of a divorce, should therefore consider the standard of living of the parties prior to the divorce. The Commission, however, agreed⁷⁹⁹ with views⁸⁰⁰ that suggested that the standard of living during the marriage could not be used when determining maintenance on death, as the breadwinner had passed away.⁸⁰¹ The Report concluded⁸⁰² that a survivor would have a claim for maintenance only if he or she was unable to provide for his or her own reasonable maintenance needs. It provided⁸⁰³ that the factors referred to in section 7(2) of the Divorce Act were important in this consideration and had to be included by implication in so far as they were not expressly included in clause 1(1) and (2) of the Bill. The Report, however, made no specific reference to the standard of living of the spouses during the marriage.

⁷⁹⁷ Clause 1(1).

⁷⁹⁸ Par 6.15.

⁷⁹⁹ Par 6.13.

⁸⁰⁰ Par 6.12.

⁸⁰¹ Par 6.13.

⁸⁰² Par 6.14.

⁸⁰³ Par 6.16.

The Bills presented to Parliament did provide for the standard of living of the survivor during the subsistence of the marriage,⁸⁰⁴ and this was included as a factor in the MSSA.⁸⁰⁵ Sonnekus⁸⁰⁶ argues that, as with the duration of the marriage, this factor has no bearing on the future maintenance needs of the survivor. He does, however, agree that the circumstances of each individual case should determine whether any weight must be placed on the standard of living during the marriage. As with the duration of the marriage, there is no indication in the Parliamentary debates as to how this factor should be applied when determining reasonable maintenance.

The standard of living as a factor was referred to by the court in *Oshry v Feldman*⁸⁰⁷ when determining the *quantum* of the claim. The court noted that the standard the spouses enjoyed during the latter part of their marriage was considerably less lavish than the one they had enjoyed in the initial years of their marriage. This would accordingly make it difficult to apply the standard of living as a factor in assessing Mrs Feldman's need for maintenance. In a rather scathing criticism of the judgment in *Oshry v Feldman*,⁸⁰⁸ Sonnekus⁸⁰⁹ suggests that the court erred in finding that Mrs Feldman had proven a need for maintenance. He suggests that the MSSA requires a consideration of the sum of all proprietary rights in order to consider the reasonableness of the alleged need for maintenance. The legislature therefore did not intend that the claimant's capital or immovable assets should remain intact for the benefit of his or her creditor and heirs and that only the income thereof be used. The court had, after all, mentioned that the extended maintenance claim was an exception to the common law principles, and Sonnekus⁸¹⁰ suggests that legislation dealing with exceptions should be interpreted restrictively. As Mrs Feldman had certain capital assets, the court should have considered them when determining her reasonable maintenance needs.

⁸⁰⁴ Clause 3(c).

⁸⁰⁵ It should be noted that this factor is not listed in section 7(2) of the Divorce Act.

⁸⁰⁶ 1990-3 TSAR 510.

⁸⁰⁷ [2011] 1 All SA 124 (SCA).

⁸⁰⁸ [2011] 1 All SA 124 (SCA).

⁸⁰⁹ 2010-4 TSAR 808–821.

⁸¹⁰ 2010-4 TSAR 813.

Sonnekus further suggests⁸¹¹ that Mrs Feldman proved that for most of their marriage, her independent income determined the standard of living she and Mr Feldman enjoyed. It is common cause that this standard of living dropped significantly in the last three years before Mr Feldman's death, after she had retired. As it was accepted by the court that she would not have been able to maintain herself if not for the voluntary contributions of her sons, it follows that she could not look to the relatively small estate of Mr Feldman to fund the standard of living that she enjoyed in the period during which she contributed to their needs.⁸¹² He suggests that the appeal judges should have taken this into account.⁸¹³

The issue of reasonable maintenance needs was also discussed in *Oosterbroek v Grobler*.⁸¹⁴ The court held⁸¹⁵ that a determination of needs depends on the interpretation and application of the MSSA. It mentioned that it could not find any cases specifically dealing with the issue of reasonable maintenance as referred to in the MSSA, despite a diligent search,⁸¹⁶ nor could counsel refer to any cases. Due to the absence of such cases, the court, while referring to the factors mentioned in section 3, looked to the provisions of section 7(2) of the Divorce Act for assistance.⁸¹⁷ While I appreciate that there are relatively few cases about the MSSA, I fail to see why the judge felt it necessary to consider the provisions of section 7(2). The MSSA lists the factors to be considered when determining needs and I see no reason why these factors should be ignored and the factors in the Divorce Act should be considered. Section 7(2) of the Divorce Act provides for similar factors as in section 3 of the MSSA, but also includes the conduct of the parties in so far as it may be relevant to the breakdown of the marriage.

⁸¹¹ 2010-4 TSAR 815.

⁸¹² 2010-4 TSAR 815.

⁸¹³ At 816.

⁸¹⁴ [2005] JOL 14792 (W).

⁸¹⁵ At 7.

⁸¹⁶ At 10.

⁸¹⁷ At 9.

The judge in *Oosterbroek v Grobler*⁸¹⁸ noted⁸¹⁹ that the courts⁸²⁰ had recognised that this section in the Divorce Act confers a wide discretion on a trial court when determining the question relating to maintenance requirements. The judge exercised what he referred to as “the wide discretion which I have as enunciated in the cases I have referred to above”⁸²¹ and found that a letter written by the executor to Mrs Oosterbroek reflected her reasonable monthly expenses that she could claim from the deceased estate. The MSSA gives no guidance for the application of the factors and the question therefore arises whether the executor, in determining the reasonable maintenance needs of the surviving spouse, also has a wide discretion. I am of the opinion that the lack of guidance as to the application of the factors points to a wide discretion on the part of the executor. The section, for example, refers to the duration of the marriage, but gives no indication whether a shorter marriage would equate to less need or a lesser obligation. The executor therefore has to decide to what extent he or she will consider this factor. Similarly, the executor must consider whether the survivor’s claimed needs are reasonable. This raises the question whether the average executor is capable of exercising this discretion. Sonnekus⁸²² is of the opinion that the wide discretion given to executors in the consideration of the claims would require clear guidance from the Master’s office to limit interference with the expression of free will by testators and I agree with him.

The MSSA provides for “any other factor which should be taken into account”. This term is rather vague and non-specific and could include just about any other factor. As Keyser⁸²³ points out, the word “should” raises the question whether matrimonial misconduct on the part of the surviving spouse should be taken into consideration when determining his or her maintenance needs, as is the case when maintenance is

⁸¹⁸ [2005] JOL 14792 (W).

⁸¹⁹ At 9.

⁸²⁰ *Katz v Katz* 1989 (3) SA 1 (A); *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA).

⁸²¹ At 11.

⁸²² 1990-3 TSAR 513.

⁸²³ 1990(1) *Annual Survey of South African Law* 5.

determined in terms of the Divorce Act. The Law Commission had stated in its Report⁸²⁴ that the conduct of the parties to a marriage should not be taken into account in order to refute a claim for maintenance. This aspect was debated when the Bill was before Parliament. One of the members, De Jager, specifically suggested⁸²⁵ that the same approach should be adopted as on divorce and that “fixed norms” should be applied when determining whether a survivor is entitled to maintenance on the death of the other spouse. According to this view, a survivor who was living with another person in adultery at the time of his or her spouse’s death, should therefore be denied maintenance from the estate of the deceased spouse. De Jager also mentioned⁸²⁶ that, despite clause 3 of the Bill providing for the factors that should be considered, there was no system of precedent as there was in court. Every executor therefore has to decide the question of reasonable maintenance in his own discretion.

Keyser suggests⁸²⁷ that, in view of the Commission’s finding⁸²⁸ that disinheritance was the exception to the rule, it could perhaps be argued that where a testator did in fact disinherit his or her spouse, he or she might have done so for good reason and the testator’s motives should therefore be scrutinised as the disinherison could be based on spousal misconduct. She concedes⁸²⁹ though that a counter argument could be that the basis of the claim is the survivor’s need for maintenance and not his or her right to share in the estate of the first-dying spouse, which means that misconduct should not be considered. This was also the view taken by the Law Commission – it stated⁸³⁰ that the issue is merely that of reasonable maintenance for someone in need. For this reason, the conduct of the surviving spouse, including a situation such as that the spouses had

⁸²⁴ Par 6.17.

⁸²⁵ Hansard 8 March 1990 at 2471.

⁸²⁶ Hansard 8 March 1990 at 2472.

⁸²⁷ 1990(1) *Annual Survey of South African Law* 5.

⁸²⁸ At par 3.13.

⁸²⁹ At par 5.

⁸³⁰ At par 6.17.

been separated, and any statements by the first-dying spouse as to the reasons for disinheriting the survivor, should not be taken into account.⁸³¹

Sonnekus,⁸³² however, does not agree with this. He uses the example of a testator who mentions in his will that he is disinheriting his wife because of her continuous extra-marital affairs. He concludes⁸³³ that, in such an instance, such a fact should indeed be taken into account when determining maintenance needs, as it could be argued that the principles of morals and decency (“fatsoen”) are the underlying principles of the maintenance claim for the surviving spouse. It is of course difficult to determine when a factor is of a moral nature. Morality is subjective and what one person views as a moral issue might not be viewed as such by another. Let us assume, for example, that the surviving spouse has a proven record of profligacy – would this lack of the ability to deal with money or assets be a fact to consider or does its consideration bring a moral slant to the consideration? Similarly, assume that the marriage between the survivor and the first-dying spouse was not a happy one to the extent that they no longer shared a home, but remained married – should the unhappy state of their marriage be taken into account or will it result in a moral judgement if it is considered? Would the position be different if the first-dying spouse had already instituted divorce proceedings but, at the time of death, the marriage still subsisted? Another consideration is the fact that certain acts of misconduct could be regarded as more serious than others. In a discussion of unworthiness to inherit in the context of family killings,⁸³⁴ Schoeman-Malan⁸³⁵ mentions that, although the MSSA is the basis of a claim for maintenance by a spouse, the common law rule of unworthiness should still apply. This rule provides that a person cannot benefit from his or her own punishable act – in the context of a family killing, it would mean that the person who committed the killing would not be able to inherit

⁸³¹ At par 6.17.

⁸³² 1990-3 TSAR 511.

⁸³³ 1990-3 TSAR 511.

⁸³⁴ “Privaatregtelike perspektief op onwaardigheid om te erf – die uitwerking van gesinsmoorde” *LitNet Akademies (Regte)* 2013(10)3 113.

⁸³⁵ At 135.

from the deceased person or claim maintenance against the deceased estate. Corbett, Hofmeyr and Kahn⁸³⁶ mention the instance where a spouse murdered his or her spouse. They also refer to the comment in the Law Commission's Report⁸³⁷ that the conduct of the spouses during the marriage should not be taken into account when determining maintenance needs. They argue⁸³⁸ that, although the issue is whether the surviving spouse is in need of maintenance and not whether the spouse has a right to share in the estate of the first-dying spouse, the legislature probably did not intend for a surviving spouse's misconduct to always be regarded as irrelevant. Their suggestion⁸³⁹ is that, if misconduct is indeed to be considered, public policy should perhaps be the criterion when determining whether or not to consider a particular instance of misconduct, so that it will only be in extreme cases, such as a spouse murdering his or her spouse, where the misconduct will lead to a maintenance claim not being met. I support this approach and do not believe that "misconduct" in general should be a factor when considering the need for maintenance. Factors such as a bad relationship between the spouses or the fact that they have separated should not have a bearing on whether or not the surviving spouse is in need of maintenance. The emphasis is after all on the survivor's need for reasonable maintenance and not his or her right to share in the estate of the first-dying spouse. In addition, while the marriage endures, the parties have a reciprocal duty of support, regardless of the circumstances. Why then should the nature of the survivor's relationship have a bearing on the determination of need? Where, however, the misconduct results in the surviving spouse being regarded as unworthy to inherit from the deceased spouse, I see no reason why such misconduct should not be considered when determining the reasonable maintenance needs of the surviving spouse. It could, after all, be argued that the maintenance needs only arose as a result of the death of the first-dying spouse and, if the surviving spouse was responsible for such death, this is definitely a factor that should be considered.

⁸³⁶ At 45.

⁸³⁷ At par 6.17.

⁸³⁸ At 45.

⁸³⁹ At 45 fn 101.

In *Feldman v Oshry*⁸⁴⁰ the judge considered⁸⁴¹ Mrs Feldman's circumstances when applying the factors to determine whether she indeed qualified for assistance from the estate. In short, the marriage had lasted approximately eighteen years; Mrs Feldman was 78 years at the time of Mr Feldman's death and it was clear from the evidence that her needs exceeded her means.⁸⁴² Selling her assets to generate funds for living expenses would not only be insufficient to maintain her for the rest of her life, but would also expose her to risk and insecurity.⁸⁴³ The judge therefore concluded⁸⁴⁴ that she had proved that she qualified for assistance. It is interesting to note that the judge clearly distinguished the application of section 7(2) of the Divorce Act from that of section 2(1) of the MSSA, in that the misconduct referred to in section 7(2) does not extend to the MSSA.

I submit that it is clear from the above that there is a very fine line between a relevant factor and a factor that requires a moral judgement, and this makes the executor's role more difficult.

Costa⁸⁴⁵ comments that the MSSA sets out the specific factors that must be considered when determining the reasonable maintenance needs of the survivor but omits to provide that the overriding factor should be that the claim must be just and equitable. He gives no explanation for this statement and it is not clear exactly what he means. I submit that there is no need to state this in the MSSA, as it is clear from the wording of section 2(1) that this is in any event the case – if the survivor cannot provide for his or her reasonable needs out of his or her own means and earnings, application of the factors will lead to a just and equitable outcome for any claim that follows.

⁸⁴⁰ [2009] JOL 23442 (KZD).

⁸⁴¹ At 19 and 20.

⁸⁴² At 19.

⁸⁴³ At 20.

⁸⁴⁴ At 20.

⁸⁴⁵ 1990(272) *De Rebus* 534.

The inclusion of “any other factors” in section 3 makes it clear that the specific factors listed are not an exclusive and exhaustive list but should rather be seen as examples of the type of factors to be taken into account when determining the maintenance needs of the survivor and the extent of the estate’s obligation. If we consider the list of factors included, the question arises as to what other factors may be regarded as relevant. This will obviously depend on the circumstances of each case. In *Mann v Leach*⁸⁴⁶ the surviving spouse claimed ongoing medical expenses and a new motor vehicle as part of her maintenance claim. A dispute arose between her and the executors of the estate as to her state of health, capacity to drive and her eyesight. She claimed that she was able to drive, despite her advanced age, but had specific requirements for the motor vehicle in order to accommodate her age. The executor expected her to undergo certain medical examinations so that he could determine if she was indeed still fit to drive, but she refused. The court held⁸⁴⁷ that her state of health, eyesight and ability and capacity to drive a vehicle were indeed relevant factors, as they had a direct effect on the basis of her claim. It accordingly ordered her to submit to the required examinations.

The decision in *Oshry v Feldman*⁸⁴⁸ should be welcomed as it gives the executor some guidance on how to determine reasonable needs and settles the question whether a lump sum award is in order. The judgment is however not entirely unproblematic. The court was especially critical of the executors’ conduct in this matter. It referred⁸⁴⁹ to their “intractable and obstructive attitude” and suggested that they had acted not in the interest of the estate, but out of selfish personal interest, as one of the executors was a residual heir to the estate. Their unwillingness to attempt to reach an agreement with the survivor led to litigation and the depletion of an already limited estate.⁸⁵⁰ The court felt⁸⁵¹ that the executors knew that they bore no risk, as the litigation from their side would be funded by the estate and they could accordingly continue their opposition to

⁸⁴⁶ [1998] All SA 217 (E).

⁸⁴⁷ At 221.

⁸⁴⁸ [2011] 1 All SA 124 (SCA).

⁸⁴⁹ At 141.

⁸⁵⁰ At 141.

⁸⁵¹ At 142.

the claim. It accordingly ordered⁸⁵² costs against the executors in their personal capacity, both in respect of the appeal and the cross-appeal. Sonnekus⁸⁵³ is strongly of the view that the executors in this case fulfilled their statutory duty by considering the claim and by defending their decision when it was challenged in a court of law. I would suggest that, while the executors may have thought or assumed that they bore no risk in their personal capacity, it is unlikely that they would have allowed the costs of the litigation to deplete the estate simply because they wanted to be obstructive. That would, after all, have a direct impact on the amount available for distribution to the heirs, one of whom was a co-executor. I do, however, agree with the remark⁸⁵⁴ by the court that the protracted litigation led to the parties being poorer, “materially as well as in human currency” and that an agreement between the parties at the outset could have avoided the litigation. While the executor has no power to force an agreement, common sense suggests that this should at least have been suggested to the survivor and the heirs. No evidence was led as to whether the executor had suggested an agreement, therefore I have to assume that this was not done, and, to that extent, I agree with the court’s comments.

Sonnekus⁸⁵⁵ suggests that the cost order made against the executors in *Oshry v Feldman*⁸⁵⁶ should serve as a dire warning to all executors – if they fulfil their statutory duty by critically examining the reasonableness of a maintenance claim lodged by a surviving spouse, they face possible personal liability for legal costs. If they do not examine the claim and simply accept it without more investigation, they face the sanction of the Estates Act and an action by the heirs for not fulfilling their duties and for not preserving the assets of the estate. While this warning is valid, I would hope that our courts will be more understanding of the executor’s role. I am heartened by the

⁸⁵² At 143.

⁸⁵³ 2010-4 TSAR 814.

⁸⁵⁴ At 142.

⁸⁵⁵ 2010-4 TSAR 820.

⁸⁵⁶ [2011] 1 All SA 124 (SCA).

court's comments in *Van Niekerk v Van Niekerk*⁸⁵⁷ where it held⁸⁵⁸ that an executor may indeed resist a claim, especially if the executor concludes, after examining the claim, that there are grounds to dispute the claim.

The question can be asked whether the meaning of "reasonable" as referred to in the MSSA, and the application thereof in practice, give effect to Parliament's intent. As indicated earlier in this section, there is no specific reference in the debates as to Parliament's intention about the meaning of "reasonable maintenance". There is also no reference as to why the MSSA refers to "reasonable maintenance needs" as opposed to "maintenance needs". On the one hand it could be argued that the inclusion of "reasonable" means that it refers to something more than pure financial need. This argument could perhaps also be supported by the reference to the duration of the marriage and the lifestyle the spouses had enjoyed as factors to consider. I submit that the lack of clarity as to the intention behind the inclusion of "reasonable" maintenance needs, together with the findings of the Law Commission, indicate Parliament's acknowledgement that the circumstances of each case would determine how a claim is assessed. This would perhaps also explain why section 3 is drafted the way it is without giving any guidance as to how, or the reason why, the stated factors should be considered when determining the reasonable maintenance needs of the survivor. The wording of section 3 perhaps explains why the court in *Oosterbroek v Grobler*,⁸⁵⁹ one of the few cases dealing with the meaning of reasonable maintenance needs, felt it necessary to refer to the factors listed in the Divorce Act. As indicated earlier in this section, I do not agree with this approach, but it supports my contention that the responsibility placed on the executor to determine if the claim is for reasonable maintenance needs is onerous and the MSSA does not provide sufficient guidance.

⁸⁵⁷ [2011] 2 All SA 635 (KZP).

⁸⁵⁸ At 640.

⁸⁵⁹ [2005] JOL 14792 (W).

4.4.3 Settling the claim

Once a need for maintenance has been determined and the executor has agreed to the reasonableness of the claim, the manner of settlement of the claim must be considered. The only guidance in the MSSA in this regard is section 2(3)(d) which provides that the executor shall have the power to enter into an agreement with the survivor and the heirs and legatees who have an interest in the agreement for the settlement of the survivor's maintenance claim and in terms of the agreement, to transfer assets of the deceased estate to the survivor. It is clear from the wording that the section empowers the executor without placing an obligation on him or her.⁸⁶⁰ Wunsh⁸⁶¹ is of the view that it is "unfortunate" that this provision requires agreement between the executor, survivor, heirs and legatees, and suggests that it would have been preferable if the court was given the power to order such a provision, even in the absence of agreement between the parties. I do not agree with Wunsh, simply because the court in any event has this power. If the parties cannot agree on the way to settle the maintenance claim, the executor will have to decide how to settle it. If any party is unhappy with the executor's decision, he or she can follow the process to object, which includes going to court if necessary. In such an instance, the court can give an order as to settlement of the claim. As Sonnekus⁸⁶² points out, the power to enter into an agreement relates only to settlement of the claim and not to the determination or consideration of the claim – this responsibility still rests solely on the executor.

Sonnekus⁸⁶³ makes the interesting point that, should an agreement be entered into, it will probably be treated in a similar fashion to a redistribution agreement. The latter agreement is sometimes used in order to make the distribution of an estate more

⁸⁶⁰ Sonnekus 1990-3 TSAR 505.

⁸⁶¹ 1990(1) *Annual Survey of South African Law* 251.

⁸⁶² 1990-3 TSAR 510.

⁸⁶³ 1990-3 TSAR 505.

practical.⁸⁶⁴ The basis of the agreement is that heirs or legatees who have vested interests can agree to redistribute their inheritances among themselves.⁸⁶⁵ A redistribution agreement is most often used when the division of assets is not practical.⁸⁶⁶ The following example should illustrate the principle behind it: in terms of a will B, C and D inherit the residue of an estate. The residue consists of an immovable property and cash. B indicates that he does not wish to own a one third share of the immovable property and prefers to receive cash. The heirs can agree that B will receive only cash and C and D will each receive fifty percent of the immovable property and so much of the cash as is necessary to make up the balance of the value of their respective one third shares of the estate.⁸⁶⁷ It is not clear exactly what Sonnekus means with his comment that the agreement in terms of section 2(3)(d) would probably be treated in the same way as a redistribution agreement. I assume that he is referring to the fact that the basis of the redistribution agreement is to give each heir assets to the same value as he or she would have received in terms of the will or intestacy, but by reshuffling the assets.⁸⁶⁸ The agreement in terms of section 2(3)(d) is to agree how the maintenance claim will be settled, which could result in a reshuffling of assets to the extent that the parties agree that assets, rather than cash, be used to settle the maintenance claim.

The agreement in terms of section 2(3)(d) could include the creation of a trust and a subsequent transfer of assets of the estate, or a right in the assets, to the trust. It could also include provisions for the transfer of assets of the estate, or a right in assets, to the

⁸⁶⁴ Meyerowitz 12.31.

⁸⁶⁵ *Klerck v Registrar of Deeds* 1950 (1) SA 6262 (T); *Bydowell v Chapman* 1953 (3) SA 514 (A); Meyerowitz 12.31.

⁸⁶⁶ *Ex parte Evans and Evans* 1950 (3) SA 732 (T); *Lubbe v Kommissaris van Binnelandse Inkomste* 1962 (2) SA 503 (O).

⁸⁶⁷ The agreement can become quite complicated and detailed if the estate does not have sufficient cash to equalise the inheritances to bring it in line with the provisions of the will or the rules of intestacy. This could necessitate heirs who wish to receive certain assets having to contribute cash or assets to the estate in order to equalise the inheritances. For purposes of this discussion it is unnecessary to go into detail.

⁸⁶⁸ Meyerowitz 12.31.

surviving spouse. It is also possible to impose an obligation on an heir or legatee in terms of the agreement. Clause 2(3)(d) of the Bill on Maintenance of Surviving Spouses B86-88 and B2-90 provided that the executor had “the power to create a trust for the benefit of the survivor in terms of an agreement with the survivor and to transfer assets from the deceased estate to the trust, in settlement of the claim of the survivor or part thereof”. The MSSA as promulgated, however, provides for an agreement with the survivor and the heirs and legatees having an interest in the agreement, including the creation of a trust. In terms of the agreement, assets of the deceased estate or a right in assets may be transferred to the survivor or the trust, or an obligation may be imposed on an heir or legatee, in settlement of the claim of the survivor or part thereof. While it could be argued that the wording in the Bill gave the executor more power as he or she merely needed the survivor to agree to the creation of a trust, the wording in the MSSA presents the parties with more options and its inclusion should be welcomed as it adds an element of practicality. The spouse and heirs could, for example, agree that the heirs “inherit” the spouse’s claim for maintenance, thereby releasing the estate from any obligation and making the heirs liable to continue with the maintenance of the spouse.

Sonnekus⁸⁶⁹ suggests that the power of the executor to impose an obligation on an heir or legatee must be welcomed as it complies with the underlying principles that the maintenance must be settled out of estate income rather than from estate assets. Meyerowitz,⁸⁷⁰ however, points out that such an obligation on the heir or legatee would have negative tax consequences for both the heir or legatee and the survivor. The heir or legatee would not be able to deduct the payment in the calculation of his or her income tax obligation as it is not an expense incurred in the production of income.⁸⁷¹ The survivor on the other hand will be taxed on the payment, as it is an annuity that

⁸⁶⁹ 1990-3 TSAR 511.

⁸⁷⁰ 15.79A.

⁸⁷¹ Section 11(a) of the Income Tax Act 58 of 1962 provides that expenses and losses actually incurred in the production of income are allowed as deductions from the income of a person, provided the expenses and losses are not of a capital nature. See also *Lambson v CIR* 1946 CPD 69.

forms part of the gross income in his or her hands.⁸⁷² The term “annuity” is not defined in the Income Tax Act 58 of 1962⁸⁷³ (hereinafter referred to as the “ITA”), but the courts have dealt with its meaning. In *KBI v Hogan*⁸⁷⁴ the court held that an annuity had two essential characteristics, namely that it is an annual or periodical payment, and that the beneficiary has the right to receive more than one payment. It has been stated⁸⁷⁵ that although one of the characteristics is that an annuity must be a fixed amount, it does not mean that the amount can never change. In *SIR v Watermeyer*⁸⁷⁶ the court held that an annuity has the element of recurrence in the sense of annual payments, even if the payments are made at intervals shorter than a year, and the element of annual occurrence can only be present if the beneficiary has a right to receive more than one instalment. Based on these “definitions” I submit that an obligation by an heir or legatee to pay maintenance to the surviving spouse will be regarded as an annuity in the hands of the surviving spouse, with the relevant tax consequences for the spouse. It has to be noted that the ITA provides⁸⁷⁷ that an amount received in terms of an order of divorce by way of alimony or allowance or maintenance is included in the gross income of the recipient, but it also provides⁸⁷⁸ that such amounts are exempt from tax. I see no reason why the ITA cannot be amended to include amounts received as maintenance in terms of a claim under the MSSA under such exemption – this will ensure that the surviving spouse is treated the same as a divorced spouse in respect of tax on the maintenance payments.

Sonnekus⁸⁷⁹ suggests that if a trust is established and income paid to the survivor, there is no danger that the capital of the estate will fall into the survivor’s estate. He, however, points out that, despite the reference to a trust in section 2(3)(d), no provision

⁸⁷² The definition of “gross income” in par (a) of section 1 of the ITA specifically includes any amount received or accrued by way of annuity.

⁸⁷³ 58 of 1962.

⁸⁷⁴ 1993 (4) SA 150 (A).

⁸⁷⁵ Haupt *Notes on South African income tax* 2015 66.

⁸⁷⁶ 1965 (4) SA 431 (A).

⁸⁷⁷ Section 1(b)(i) definition of “gross income”.

⁸⁷⁸ Section 10.

⁸⁷⁹ 1990-3 TSAR 512.

is made for dealing with the unused assets of the trust when the survivor's maintenance needs cease. I do not perceive this as a problem as the MSSA merely provides for a trust being an option available to deal with the claim – the MSSA need not include details pertaining to the trust, as this is something that the parties thereto will have to agree on and include in the trust deed. Sonnekus⁸⁸⁰ argues that the reference to “a right in the assets” appears to be meaningless, as the phrase “assets of the deceased” means the sum of the deceased's patrimonial rights. He suggests⁸⁸¹ that the legislature used the words “a right in the assets” to refer to limited real rights such as usufruct or rights of use or occupation in assets of the estate, as opposed to rights of ownership. He further suggests⁸⁸² that in most cases the survivor's main need would be for a roof over his or her head and suggests that this could easily be addressed by giving the survivor a usufruct or right of use or occupation over the assets rather than transferring assets or paying an amount to the survivor.⁸⁸³ While it is true that the survivor would probably in most instances require accommodation, I do not agree that it could simply be assumed that this would always be his or her main need. Quite often the survivor might already own property or inherit a property from the first-dying spouse. His or her main need might then be income to use towards his or her maintenance needs, which will include expenses related to the property. Giving the survivor a usufruct over a property will not necessarily address this need. In addition, the granting of a usufruct could add strain on what is probably already a strained relationship between the spouse and the heirs, as the heirs will be the owners of the property in which the spouse lives.

Sonnekus⁸⁸⁴ suggests that, where the granting of a usufruct or right of use or occupation is impossible, the Master should instruct the executor to pay an amount into a trust so that monthly maintenance could be paid to the survivor. If the survivor's circumstances change, the amount could be readjusted, and any surplus or unused amounts could be

⁸⁸⁰ 1990-3 TSAR 512.

⁸⁸¹ 1990-3 TSAR 512.

⁸⁸² 1990-3 TSAR 499.

⁸⁸³ 1990-3 TSAR 507.

⁸⁸⁴ 1990-3 TSAR 507.

distributed to the heirs. I suggest that this is a much better alternative as it protects the interests of both the survivor and the heirs to the estate.⁸⁸⁵

As mentioned above,⁸⁸⁶ section 2(3)(d) was amended by the Estate Affairs Amendment Act.⁸⁸⁷ Before the amendment the section provided that the executor shall have the power to enter into an agreement with “the survivor, heirs and legatees...”. The amendment merely added the words “having an interest in the agreement” after the reference to heirs and legatees. The question arises as to why a legatee would have an interest in the agreement. The liabilities of an estate are settled from the residue of the estate, in other words from assets that are not specially bequeathed to legatees, unless the testator provides in his or her will that a specific liability (or indeed, all liabilities) be settled from the special bequests.⁸⁸⁸ The survivor’s maintenance claim will therefore, in the absence of a contrary provision in the will, be settled from the residue of the estate and it will not have an impact on the special bequests and legatees. Where the residue is insufficient to settle the debts of the estate, the executor will, however, have recourse to the special bequests to settle the outstanding debts.⁸⁸⁹ If a legatee wishes to retain the asset bequeathed to him or her, he or she will have to pay the amount necessary to settle his or her share of the debts into the estate.⁸⁹⁰ In such a case, there will be no residue and the estate will devolve on the legatee. It is in such a scenario that a legatee would be a party who has an interest in the agreement and the inclusion of the words “holding an interest in the agreement” should be seen in this context.

Costa⁸⁹¹ suggests that the MSSA should provide that the survivor’s claim arises at the death of the deceased spouse so that it allows for interim maintenance for the survivor until his or her claim has been accepted by the executor of the deceased estate. This is

⁸⁸⁵ This solution is discussed in more detail in 8.3.5.

⁸⁸⁶ In 4.1.

⁸⁸⁷ 1 of 1992.

⁸⁸⁸ *In re Brown* 7 SC 237; *Roodt’s Heirs v Roodt’s Estate* 1911 SR 87; Meyerowitz 18.2, 18.8.

⁸⁸⁹ Meyerowitz 18.8.

⁸⁹⁰ *Van der Lith’s Estate v Conradie* 20 SC 241; Meyerowitz 18.8.

⁸⁹¹ 1990(272) *De Rebus* 534.

important in view of the fact that it often takes months, if not years, before the maintenance claim is settled.⁸⁹² The surviving spouse and dependent children of the deceased will usually only receive payments or benefits from the deceased estate once the liquidation and distribution account has lain open for inspection.⁸⁹³ The Estates Act, however, provides⁸⁹⁴ that the executor may, before the account has lain open for inspection, release such monies and property out of the estate as the executor deems fit to provide for the subsistence of the deceased's family or household. This can, however, only be done with the consent of the Master. Uniform Rule 43 of the High Court and Rule 58 of the Magistrate's Court provide that where a spouse seeks relief from the court in respect of maintenance pending divorce proceedings, the court may, after hearing such evidence it considers necessary, dismiss the application or make such order it deems fit to ensure a just and expeditious decision. Section 26 probably achieves the same goal in the context of a maintenance claim against a deceased estate, except that the executor must consider the application and the Master must consent to any payments. The court in *Van Niekerk v Van Niekerk* referred⁸⁹⁵ to this when addressing the executor's response to a request by the surviving spouse's attorney that maintenance be paid to her every month. It mentioned⁸⁹⁶ that a proper exercise of the power in terms of section 26(1A) of the Estates Act would lead to the executor paying maintenance to the surviving spouse while dealing with the maintenance claim. The court in *Banjatwa v Maintenance Officer for the district of Butterworth*⁸⁹⁷ also referred⁸⁹⁸ to the executor's powers in section 26(1A). In a subsequent case dealing with the maintenance claim by a minor child against the estate of her deceased father, the

⁸⁹² This might explain why some applicants have approached the maintenance court for assistance – see, for example, *Banjatwa v Maintenance Officer for the district of Butterworth* 2014 (6) SA 116 (ECM). See also the reference below to section 26(1A) of the Estates Act. The delay in settling a claim under the MSSA will be dealt with further in 7.3.1.

⁸⁹³ *D v T* 2016 (4) SA 571 (WCC) at 26; *Abrie et al* 115; Meyerowitz 12.17; *LAWSA* vol 31 "Wills and succession" 448.

⁸⁹⁴ Section 26(1A).

⁸⁹⁵ At 641.

⁸⁹⁶ At 641.

⁸⁹⁷ 2014 (6) SA 116 (ECM).

⁸⁹⁸ At par 17.

court in *D v T*⁸⁹⁹ held that the executor stepped into the shoes of the deceased and, while the estate is intact, the child's claim lies against the executor. The court agreed with the remark in *Banjatwa v Maintenance Officer for the district of Butterworth* that section 26(1A) was specially designed to alleviate family hardship during the liquidation process. I do believe though that Costa's suggestion for a specific provision for interim maintenance is valid, as it will provide clarity and guidance to the executor.

A question that arises is whether the claim must be settled by way of a lump sum or by way of regular (for example, monthly) payments. The MSSA gives no direct guidance in this regard, but I am of the opinion that the wording of section 2(3)(d) does give some guidance. It provides that the agreement the executor is empowered to enter into with the survivor, heirs and legatees could include the transfer of assets to the survivor. I submit that this indicates that, although the focus of the MSSA is to provide for maintenance of the survivor, the executor does have the option to make a lump sum payment should it be more appropriate in the circumstances. Sonnekus⁹⁰⁰ mentions that maintenance claims traditionally are periodical as they are supposed to only cover the claimant for the period for which they are given. In his discussion of *Kruger v Goss*⁹⁰¹ he states⁹⁰² that he is uncomfortable with a principle that future maintenance needs be settled by way of a lump sum. He refers to the Maintenance Act which defines⁹⁰³ a maintenance order as "any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person ..." and suggests⁹⁰⁴ that maintenance payments should always be periodical as the success of the claim would depend on the continuing need of the claimant and the continuing ability of the person paying maintenance.

⁸⁹⁹ 2016 (4) SA 571 (WCC).

⁹⁰⁰ 2010-4 TSAR 819.

⁹⁰¹ 2010 (2) SA 507 (SCA).

⁹⁰² 2010-3 TSAR 629.

⁹⁰³ Section 16(2)(a).

⁹⁰⁴ 2010-3 TSAR 629.

The nature of the maintenance claim was a key point in *Feldman v Oshry*.⁹⁰⁵ Mrs Feldman had claimed a lump sum award, as she argued that this was the most practical way of dealing with her claim. The executor, however, argued that a lump sum award was not competent. The judge in the High Court remarked⁹⁰⁶ that there were no reported decisions on the form a maintenance order in terms of the MSSA should take, but that the ordinary grammatical meaning of “maintain” includes the habitual practise of an action or the continuation of something. This means that there are elements of continuity and repetition. The judge therefore concluded⁹⁰⁷ that maintenance in terms of the MSSA should be by way of periodic payments and not a lump sum, unless the parties agreed to the latter. He also referred⁹⁰⁸ to policy concerns advocating against a lump sum – the estate could be exposed to risk as the spouse might die earlier than expected according to the mortality tables,⁹⁰⁹ or he or she might remarry despite assumptions to the contrary.⁹¹⁰ In all such cases, the estate, and specifically the heirs, would be prejudiced. Conversely, the spouse might live longer than his her predicted life expectancy or inflation or the cost of living might increase unexpectedly, which in turn would leave him or her destitute as the capital amount of the maintenance award would be exhausted.⁹¹¹ This result would be in direct opposition to the provisions of the MSSA, which were specifically designed to avoid the surviving spouse being destitute.⁹¹² All of these factors therefore justified periodical payments rather than a lump sum. The judge was however mindful that periodical payments would delay the finalisation of the estate and create uncertainty on the part of the executor as to the amount of the estate to be retained in order to fund the ongoing maintenance.⁹¹³ He suggested⁹¹⁴ that, rather than settling the claim with a lump sum, the solution was a negotiated agreement in

⁹⁰⁵ [2009] JOL 23442 (KZD).

⁹⁰⁶ At 20.

⁹⁰⁷ At 22.

⁹⁰⁸ At 23.

⁹⁰⁹ At 23.

⁹¹⁰ At 24.

⁹¹¹ At 24.

⁹¹² At 24.

⁹¹³ At 24.

⁹¹⁴ At 25.

terms of section 2(d) (sic)⁹¹⁵ between all the parties in terms of which they settled on an amount. Based on the circumstances of the case, the judge held⁹¹⁶ that the claim by Mrs Feldman for a lump sum was misconceived and neither competent nor called for. A monthly maintenance award was therefore made in Mrs Feldman's favour until her death or remarriage, or until the order was otherwise varied, suspended, or discharged according to law.⁹¹⁷

Heaton⁹¹⁸ criticises this finding that a lump sum award was not competent, as an award for periodic maintenance delays the finalisation of a deceased estate, especially in the event of a polygynous marriage where several surviving spouses lodge maintenance claims against the estate of their deceased husband. She suggests⁹¹⁹ that the MSSA be amended to specifically empower the court to make a lump sum maintenance award.

This issue of the nature of the settlement of the claim has since been settled by the Supreme Court of Appeal. In the appeal⁹²⁰ against *Feldman v Oshry*,⁹²¹ Mrs Feldman submitted that the High Court's ruling of a monthly maintenance award, rather than a lump sum, was wrong. In assessing her submission, the Supreme Court took a two-legged approach to the issue of a lump sum:

- Was the lump sum award competent; and
- If so, was the lump sum award appropriate?

On the issue of **competence**, the court held⁹²² that the policy concerns referred to by the High Court did not prove an insurmountable obstacle. While not disputing the potential existence of such difficulties, the court held⁹²³ that the reference to "any other

⁹¹⁵ The reference to section 2(d) is incorrect as there is no such section – the correct section is 2(3)(d).

⁹¹⁶ At 33.

⁹¹⁷ At 35.

⁹¹⁸ "Family law" 2009(1) *Annual Survey of South African Law* 485.

⁹¹⁹ 2009(1) *Annual Survey of South African Law* 485.

⁹²⁰ *Oshry v Feldman* [2011] 1 All SA 124 (SCA).

⁹²¹ [2009] JOL 23442 (KZD). See also 4.3.4.

⁹²² At 138.

⁹²³ At 139.

factor” in section 3 of the MSSA means that a court must consider all the circumstances of a matter to arrive at a just result. The additional administrative burden on the executor and the extra costs associated with a periodical payment would be other factors to consider.⁹²⁴ It referred⁹²⁵ to the report of the Master lodged with the High Court application, in which the Master stated that practicality dictated a once-off payment as the preferred settlement option, as periodical payments would delay the finalisation of the estate, which would prejudice the creditors and heirs. While I agree that the heirs would be prejudiced if the finalisation of the estate is delayed, I do not agree that periodical payments would necessarily prejudice the creditors – as provided for in section 2(3)(b) and discussed above, the maintenance claim does not rank equal to that of the creditors, so their claims would be settled before the maintenance claim is settled.

The Supreme Court of Appeal accordingly held⁹²⁶ that the High Court had erred in finding that a lump sum was not competent. It referred⁹²⁷ to the provisions in section 2(3)(d) of the MSSA that provide for an agreement between the interested (“affected”) parties and indicated that such settlement should be the order of the day, but suggested⁹²⁸ that such agreements were unlikely to happen as common sense is often lacking in disputed matters. I fully agree with this statement based on my experience in administration of estates and discussions with estates officers⁹²⁹ and suggest that in most cases an agreement between the interested parties would be unlikely. I am of the view that it is more likely that the heirs, rather than the spouse, would consent to an agreement in terms of which an amount is placed in trust for the funding of the survivor’s maintenance, as this could mean that there would be some surplus available for them when the survivor’s maintenance needs ceased. It is probably unlikely that the

⁹²⁴ At 139.

⁹²⁵ In fn 11.

⁹²⁶ At 140.

⁹²⁷ At 139.

⁹²⁸ At 139.

⁹²⁹ See 7.3.1 and 7.3.2 for more details.

survivor would agree, as such an agreement would not allow him or her to receive a lump sum. While placing an obligation on the heirs may sound more viable, I would suggest that the heirs would probably wish to sever financial ties with the survivor, and they (and probably also the survivor) would be unlikely to agree to obligations being placed on them.⁹³⁰

On the issue of **appropriateness** of a lump sum award, the court referred⁹³¹ to the executors' claim that a lump sum award was not appropriate in light of Mrs Feldman's advanced age and the relatively modest estate of Mr Feldman. It held⁹³² that by the time of the High Court judgment, four years had passed since Mr Feldman's death and Mrs Feldman had not received any maintenance during that period. A further year had passed since the High Court judgment. If not for the contributions by her sons, Mrs Feldman would not have been able to maintain herself. Mr Feldman's heirs on the other hand appeared to be persons of means.⁹³³ The court held⁹³⁴ that these observations, together with Mrs Feldman's age and the limited size of the estate, did not justify periodical maintenance payments, as the arrear maintenance for the period since death would wipe out the entire estate. The court accordingly awarded a lump sum equal to the net value of the estate, after payment of liabilities and administration costs, to Mrs Feldman.⁹³⁵

Sonnekus argues⁹³⁶ that the factors that led the court to decide that a lump sum was competent and appropriate, namely Mrs Feldman's advanced age, the long period during which she received no maintenance and the limited extent of the estate, dictate against a lump sum. Mrs Feldman's advanced age, for example, meant that there was a much bigger probability of death, in which case the balance of the lump sum would fall

⁹³⁰ On the possible problems with the granting of a usufruct to the survivor, see also 8.3.4.

⁹³¹ At 139.

⁹³² At 139.

⁹³³ At 140.

⁹³⁴ At 140.

⁹³⁵ At 143.

⁹³⁶ 2010-4 TSAR 819.

into her estate and be available for the benefit of her heirs, which clearly was not the intention of the legislature.⁹³⁷ He suggests⁹³⁸ that a trust or limited interest such as a usufruct of right of occupation would be more appropriate in the case of an aged claimant.⁹³⁹ In an earlier article he suggests⁹⁴⁰ that the court should direct that the maintenance claim be paid into a trust from where the trustees must make periodic payments to the surviving spouse. In this way, the estate can be finalised, the lump sum maintenance will be protected from the creditors of the surviving spouse, and any residue that might still be available when the surviving spouse's maintenance needs come to an end, will fall back into the estate of the person paying maintenance for distribution to his or her heirs. While I agree with the suggestion of a trust, I submit that Sonnekus' reference to the residue falling back into the estate of the person paying maintenance is incorrect, especially in view of the comment that the estate should be finalised. I submit that the correct way of handling this would be to determine that the residual heirs of the deceased estate are the capital beneficiaries of the trust, who would on termination receive the remaining capital of the trust. The capital will therefore devolve directly on the beneficiaries without first having to fall back into the estate to be dealt with by the executor. I note though that Sonnekus in his later article⁹⁴¹ discussing *Oshry v Feldman*⁹⁴² indeed refers to a trust where the heirs of the first-dying spouse are named as capital beneficiaries after the demise of the surviving spouse.

4.4.4 Duration of the claim

Section 2(1)(a) provides that, where a marriage is dissolved by death, the survivor shall have a claim against the estate of the deceased spouse for the provision of his or her

⁹³⁷ 2010-4 TSAR 820.

⁹³⁸ 2010-4 TSAR 820.

⁹³⁹ 2010-4 TSAR 820.

⁹⁴⁰ 2010-3 TSAR 636.

⁹⁴¹ 2010-4 TSAR 820.

⁹⁴² [2011] 1 All SA 124 (SCA).

reasonable maintenance needs **until his or her death or remarriage** (my emphasis), to the extent that he or she is not able to provide for such maintenance needs from own means and earnings.

Corbett, Hofmeyr and Kahn suggest⁹⁴³ that the words “until his death” are unnecessary as the spouse can never be in need of maintenance after his or her death. Sonnekus⁹⁴⁴ echoes this and states that this provision appears to be unnecessary, as it is obvious that maintenance cannot be paid for a person who is deceased. He suggests⁹⁴⁵ that the inclusion of these words is rather meant to reinforce the principle that the maintenance payment is intended to provide for the surviving spouse’s needs during his or her lifetime and should therefore last only for his or her lifetime. On the death of the survivor, there should, in theory, not be any unused funds left which will form part of his or her estate. He suggests⁹⁴⁶ that the legislation should include provisos to cater for a situation where a lump sum payment is made and an unused portion is left at the death of the surviving spouse, to ensure that such amount reverts to the first-dying spouse’s estate or his or her heirs.

As indicated at the outset of this thesis,⁹⁴⁷ I agree that it would be equitable that the claim for maintenance should be reconsidered if the surviving spouse obtains another source of income and may no longer be in need as required, but the MSSA does not provide a mechanism to allow for reassessment of the claim where the liquidation and distribution account has already been accepted and assets have been transferred to the survivor in settlement of his or her maintenance claim.⁹⁴⁸ The situation could, however, be different if, instead of assets being transferred to the survivor, a right to assets is given to the survivor or an obligation is imposed on an heir or legatee in terms of an

⁹⁴³ 45 fn 98.

⁹⁴⁴ 1990-3 TSAR 503.

⁹⁴⁵ 1990-3 TSAR 503.

⁹⁴⁶ 1990-3 TSAR 503.

⁹⁴⁷ See 1.2.4.

⁹⁴⁸ Sonnekus 1990-3 TSAR 505.

agreement between the executor, survivor, heirs and legatees in terms of section 2(3)(d). Sonnekus⁹⁴⁹ suggests that in such a scenario it should be possible for the claim to be reconsidered. I agree that this would be possible, because the assets would either still be part of the deceased estate and under the control of the executor, or the assets would have been transferred to the heirs of the estate, subject to some intervening right on behalf of the spouse or some other obligation placed on the heirs. If, for example, the spouse's need is mainly for accommodation and the executor grants him or her a right of occupation in respect of an immovable property, this right could be re-assessed if the spouse should, for example, inherit money which allows him or her to acquire alternative accommodation. It is essential that the agreement entered into provides the necessary mechanism to re-assess the claim if the surviving spouses' circumstances should change. If the agreement is for the setting up of a trust, the trust deed should give the trustee/s the power (or discretion) to assess the survivor's needs on an ongoing basis to ensure that no more is paid to him or her than required to cover his or her maintenance needs. Where the agreement is to transfer assets to the heirs or legatees with a limited interest to the surviving spouse, or to place the obligation of maintenance on the heirs or legatees, the agreement will have to provide for the right to reassess the claim, so that this can be registered as a condition against the title deeds of any immovable property.

Sonnekus⁹⁵⁰ suggests that the Chief Master should consider issuing the following guidelines to executors:

- No amounts should be paid to the survivor if it is possible to provide for his or her maintenance needs by some other means, for example a usufruct or right of occupation or use over the marital assets;
- Should the abovementioned not be possible and the only option is to settle the maintenance claim by way of a transfer of assets to the survivor, the payment

⁹⁴⁹ 1990-3 TSAR 506.

⁹⁵⁰ 1990-3 TSAR 506.

should ideally be made to a trust established for that purpose. The monthly requirements of the survivor could be met from the trust and, on the survivor's death or remarriage or the cessation of his or her maintenance needs for whatever other reason, the unused portion of the trust assets would fall back into the estate of the first-dying spouse and become available to his or her heirs.

While I support the principle behind the suggestion of a trust and discuss this in more detail in chapter 8, I foresee a practical problem with the assets falling back into the estate of the first-dying spouse where the surviving spouse's maintenance needs cease long after the deceased estate was finalised, especially if the executor has already been discharged from office.⁹⁵¹ I would therefore rather suggest that the trust be set up in such a way that, on the survivor's death or remarriage, or cessation of his or her maintenance needs, the trust shall terminate and the unused funds shall automatically devolve on the heirs of the first-dying spouse, whether testate or intestate.⁹⁵²

A question that comes to mind when reading section 2(1) is whether the words "until his death or remarriage" mean that maintenance cannot be awarded for a shorter period. Costa⁹⁵³ comments that the use of these words seems to indicate that the legislature did not intend giving the executor the discretion to assess the surviving spouse's circumstances and, where appropriate, to pay maintenance to him or her for a limited period of time only. This is in stark contrast with the Divorce Act which provides⁹⁵⁴ that maintenance can be paid "for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur".⁹⁵⁵ I would suggest that the reason why the MSSA does not give the executor the power to pay maintenance for a limited period only, is because the nature of a maintenance claim on death is different from a maintenance claim on divorce. In the event of a divorce, the

⁹⁵¹ In terms of section 56 of the Estates Act.

⁹⁵² See also 4.4.3 and 8.3.5 in this regard.

⁹⁵³ 1990(272) *De Rebus* 534.

⁹⁵⁴ Section 7(2).

⁹⁵⁵ Costa 1990(272) *De Rebus* 534.

maintenance-paying former spouse is still alive, and the recipient spouse can approach the court for a revised maintenance order if his or her circumstances change after the limited period for which maintenance was granted.⁹⁵⁶ The same cannot happen in the event of death as the assets from which the maintenance claim could be met will have been transferred to the heirs of the estate and it would not be just and equitable to allow the surviving spouse to claim against the heirs if his or her circumstances should change after the limited period for which maintenance was granted. That being said, I agree with Costa's view that maintenance for a limited period should be possible, and that there should be a practical way of dealing with this so that a lump sum calculated till the death of the survivor is not paid to the survivor. I submit that the words "until his death or remarriage" are not intended to convey a prescribed period, but rather to reflect the maximum period for which maintenance could apply. It should therefore be possible for the executor and the surviving spouse to agree to maintenance for a shorter period.

As Costa⁹⁵⁷ rightly points out, the changed circumstances would not only relate to a scenario where the surviving spouse is in a better financial position, for example where he or she receives a substantial inheritance. It could also include a scenario where the spouse is negatively affected by changed circumstances, for example where inflation rates increase to such an extent that the original amount claimed by him or her becomes inadequate. The Divorce Act⁹⁵⁸ empowers a court to "rescind, vary or suspend" a maintenance order if it finds sufficient reason to do so. Costa suggests that the MSSA be amended to provide that the executor and surviving spouse are given the power to rescind or vary any periodic maintenance order. He also suggests that the Maintenance Act⁹⁵⁹ be amended to specifically provide for orders in terms of the MSSA.

⁹⁵⁶ See section 8(1) of the Divorce Act.

⁹⁵⁷ 1990(272) *De Rebus* 534.

⁹⁵⁸ Section 8.

⁹⁵⁹ 23 of 1963. Costa's view would, by implication, also extend to the Maintenance Act 99 of 1998.

Sonnekus⁹⁶⁰ suggests that the Master's offices should have a mechanism whereby the heirs could advise the Master of a change in the circumstances of the survivor so that the Master could instruct the executor to distribute the unused maintenance amongst the heirs. This would in all probability require the executor to claim the amount from the survivor in terms of the *condictio indebiti*. I again foresee a practical problem if such a situation should occur long after the deceased estate was finalised, especially if the executor has already been discharged from office. It also cannot be accepted that the mere change in the survivor's circumstances would necessarily lead to the conclusion that the claim must be adjusted. Somebody would have to investigate the changed circumstances and the impact they have on the claim and it is not clear where this responsibility would lie if the estate has already been finalised.

Section 2(3)(d) provides that the agreement entered into between the interested parties could include the imposition of an obligation on an heir or legatee in settlement of the claim of the survivor. I assume that such an obligation would be similar to a scenario where the deceased spouse in his or her will bequeaths the estate (or part thereof) to an heir or legatee, subject to a condition that the heir or legatee must provide for the maintenance needs of the surviving spouse. This option would mean that the administration of the estate could be finalised without undue delay, with a reduced risk of the capital amount being paid to the spouse whose circumstances might change in his or her favour, but I am not convinced that it would be the most practical way to deal with the maintenance issue. What would, for example, happen if the heir does not fulfil the obligation to maintain the surviving spouse? If this happens after the estate has been finalised, the spouse would have to resort to legal action to enforce the obligation, which does not appear practical if we consider that the reason behind the imposition of the obligation is that the spouse does not have the means to fund his or her own maintenance needs. A person who cannot maintain him- or herself will surely not have the means to institute legal action.

⁹⁶⁰ 1990-3 TSAR 506.

4.4.5 Dealing with the claim

Section 2(3)(a) of the MSSA provides that the proof and disposal of the maintenance claim shall be dealt with in accordance with the provisions of the Estates Act.⁹⁶¹ This means that the executor has to consider the claim and decide whether or not to allow it within the framework of the provisions⁹⁶² of the Estates Act. I find it interesting that the court in *Oshry v Feldman*⁹⁶³ states⁹⁶⁴ that section 3 sets out the factors that **a court** (my emphasis) should consider in determining a surviving spouse's reasonable maintenance needs as it is clear from the wording of section 2(3)(a) that the responsibility of assessing the claim is placed on the shoulders of the executor.⁹⁶⁵

The surviving spouse must lodge his or her claim with the executor within the time frame provided in section 29 of the Estates Act⁹⁶⁶ and the executor must deal with the claim. As with every other creditor's claim, the executor must carefully examine the claim to decide whether or not to accept it.⁹⁶⁷ Where deemed necessary, he or she may call on the surviving spouse to provide the necessary proof of the claim. In view of the fact that the MSSA provides that the claim is available if the surviving spouse's own means and earnings do not cover his or her reasonable maintenance needs, it follows that the executor would need details of the spouse's needs and proof of his or her own means and earnings. It would probably be prudent to ask for an affidavit from the surviving spouse in this regard, as well as substantiation of the spouse's means and expenses. In terms of section 32(1) of the Estates Act, the executor may, if he or she disputes a claim, request the claimant to provide an affidavit in support of the claim. The *Oxford Dictionary of Current English*⁹⁶⁸ defines⁹⁶⁹ "dispute" as "to argue about" or

⁹⁶¹ See 2.5.2.6 for more details.

⁹⁶² Sections 32 and 33.

⁹⁶³ [2011] 1 All SA 124 (SCA).

⁹⁶⁴ At 132.

⁹⁶⁵ See also Sonnekus 2010-4 TSAR 813–814.

⁹⁶⁶ See 2.5.2.4 for details of the time frame.

⁹⁶⁷ *Wood v Estate Thompson* 1949 (1) SA 607 (D).

⁹⁶⁸ Soanes 2006.

“question the proof or validity of”, and it is my submission that the application of section 32(1) is not limited to a situation where the executor argues about the claim, but also applies to a situation where the executor needs more information about the claim in order to determine whether or not to accept it. In practice⁹⁷⁰ the claim is usually calculated by an actuary who takes into account the effects of inflation to ensure that the amount of the claim is sufficient to maintain the survivor for the duration of his or her life expectancy.⁹⁷¹ Section 32(1) also provides that the executor may, with the consent of the Master, require the claimant or any other person who the Master feels may be in a position to give material information in respect of the claim, to appear before the Master or any magistrate or other Master nominated by the Master to be examined under oath in connection with the claim.⁹⁷²

Once the executor has made a decision regarding the claim, any person who is not happy with the decision can lodge an objection with the Master.⁹⁷³ The Master has the power to decide on the objection⁹⁷⁴ – if the Master feels that the objection is well-founded, he or she may direct the executor to amend the liquidation and distribution account or may give such other direction in connection with the account as he or she deems fit.⁹⁷⁵ If the objecting party is dissatisfied with the Master’s decision, he or she may apply to court for an order to set aside the Master’s decision.⁹⁷⁶ As stated in chapter 2,⁹⁷⁷ the Master cannot resolve a factual dispute between the surviving spouse and the heirs,⁹⁷⁸ and the objecting party may apply to court for an order where the Master has decided that it is a factual dispute that he or she cannot rule on.

⁹⁶⁹ At 257.

⁹⁷⁰ As per discussions with estates officers and practitioners – see 7.3.1 and 7.3.2 for more details.

⁹⁷¹ Botha *et al* 58.

⁹⁷² See 2.5.2.6 in this regard.

⁹⁷³ Section 35(7) Estates Act.

⁹⁷⁴ Section 35(9) Estates Act.

⁹⁷⁵ Abrie *et al* 119; LAWSA vol 31 “Wills and succession” 453.

⁹⁷⁶ Section 35(10) of the Estates Act.

⁹⁷⁷ At 2.5.2.9.

⁹⁷⁸ See also *Broodryk v Die Meester* 1991 (4) SA 825 (C); *Ferreira v Die Meester* 2001 (3) SA 365 (O); *Jewaskewitz v Master of the High Court Polekwane* (sic) unreported, case number 53514/2012 [2013] ZAGPPHC 118, judgment delivered on 16 May 2013.

The question must be asked whether the average executor has the necessary skill and expertise to consider whether the survivor's maintenance claim is reasonable. Sonnekus⁹⁷⁹ points out (correctly in my opinion) that the guidelines in the MSSA are not very helpful and the executor to a large extent must use his or her own judgement when considering the claim. As decisions of executors do not form precedents and have no binding authority, legal certainty would only exist where individual cases came before a court for decision or where the Chief Master issues a general guideline to assist the executor.⁹⁸⁰ All other cases will be left to the discretion of the executor in the specific estate. Sonnekus⁹⁸¹ suggests that this places an additional burden on the executor, as he or she would have to consider the survivor's actuarial claim. The approach followed by the court in *Seidel v Lipschitz*⁹⁸² indicates the extent to which an executor must go to assess a claim. Having been involved with the administration of deceased estates, I can attest to the fact that an actuarial claim is of a technical nature and difficult to assess and requires a certain level of knowledge that I do not believe the average executor possesses.⁹⁸³ In my discussions with estates officers,⁹⁸⁴ it also appears that maintenance claims are often lodged without sufficient supporting documentation, which makes it even more difficult for the executor to assess the reasonableness of the claim.

In *Jewaskewitz v Master of the High Court Polekwane* (sic)⁹⁸⁵ the executor had accepted a claim by the surviving spouse for maintenance in terms of the MSSA. One of the heirs lodged an objection against the liquidation and distribution account. The Master, after some delay, advised that it did not fall within his area of expertise to determine whether the spouse qualified for maintenance and, if so, what an appropriate amount would be. He ruled that the objecting party should follow the process provided for in section 35(9)

⁹⁷⁹ 1990-3 TSAR 504.

⁹⁸⁰ Sonnekus 1990-3 TSAR 504.

⁹⁸¹ 1990-3 TSAR 504.

⁹⁸² Unreported, case number 24960/11 [2013] ZAWCHC, judgment delivered on 24 October 2013.

⁹⁸³ See also discussions with estates officers in 7.3.1 and 7.3.2.

⁹⁸⁴ See 7.3.1 and 7.3.2 for details.

⁹⁸⁵ Unreported, case number 53514/2012 [2013] ZAGPPHC 118, judgment delivered on 16 May 2013.

and (10) of the Estates Act. The objecting party approached the court for assistance. The court held⁹⁸⁶ that the information presented to it to determine if the surviving spouse was in need of maintenance, was incomplete, as a proper actuarial claim was not included. It held that such a calculation is of cardinal importance as it would enable the court to determine and quantify the spouse's needs. The court therefore held⁹⁸⁷ that the attack on the survivor's claim was understandable as it "lacked a proper calculation and computation". The court held⁹⁸⁸ that it would serve no purpose to refer the matter back to the Master in view of these circumstances and found that it should be referred to evidence as the matter could not be decided on the basis of the papers presented to court.

Costa⁹⁸⁹ is especially critical of the fact that the MSSA allows for the maintenance claim to be dealt with in terms of the Estates Act, as he suggests that the Master's office is not equipped to deal with claims of this nature. He argues⁹⁹⁰ that a rejection by the executor of a claim by a surviving spouse could lead to litigation, which would delay the settlement of the claim and the liquidation and distribution of the deceased estate. I agree with Costa. A quick analysis of the cases referred to in this chapter reveals significant delays in the consideration and settling (or not) of the maintenance claims. In *Oosterbroek v Grobler*⁹⁹¹ the date of death was 18 May 2002. The judgment confirming that the surviving spouse was entitled to maintenance was given on 20 September 2004. In *Oshry v Feldman*⁹⁹² the date of death was 3 May 2005. The High Court hearing was on 6 December 2007 and the judgment given on 14 April 2009. The judgment in the Supreme Court of Appeal was given on 19 August 2010. In *Jewaskewitz v Master of the High Court Polekwane* (sic)⁹⁹³ judgment was given on 16 May 2013, three years and

⁹⁸⁶ At 14.

⁹⁸⁷ At 14.

⁹⁸⁸ At 16.

⁹⁸⁹ 1990(272) *De Rebus* 534.

⁹⁹⁰ At 534.

⁹⁹¹ [2005] JOL 14792 (W).

⁹⁹² [2011] 1 All SA 124 (SCA).

⁹⁹³ Unreported, case number 53514/2012 [2013] ZAGPPHC 118, judgment delivered on 16 May 2013.

eight months after the death of the first-dying spouse. In *Friedrich v Smit*⁹⁹⁴ the date of death was 17 September 2006, and the judgment was only given on 13 October 2015. The only instance in which judgment was given relatively soon after the date of death was *Van Niekerk v Van Niekerk*,⁹⁹⁵ where a period of only one year elapsed between the date of death and the judgment. Despite this relatively short period, one year is an unacceptably long period from the perspective of a surviving spouse who does not have the means to maintain him- or herself.

Costa⁹⁹⁶ is of the view that there is a solution for this – he suggests that Uniform Rule 43 of the Supreme Court (now the High Court) relating to interim maintenance applications pending divorce proceedings⁹⁹⁷ should be applied until the maintenance claim under the MSSA can be settled by a maintenance officer in terms of the Maintenance Act. He acknowledges that this could lead to practical issues such as insufficient staffing and time delays, but suggests⁹⁹⁸ that it makes more sense to staff the maintenance courts, as they are better equipped to deal with maintenance claims than the Master's office. I believe there is merit in Costa's view, but submit that it should be unnecessary to report to a court if the MSSA provides a better mechanism to deal with settlement of the claim. This aspect is discussed in detail in chapter 8.

The maintenance claim will have an impact on the balance of assets available in the estate to distribute to the heirs, so it is at least theoretically possible that the claimant and heirs will have opposing interests. One of the parties (if not both) may feel aggrieved by the executor's decision and may bring into question the executor's objectivity. If the executor accepts the survivor's claim, it is possible that the heirs may feel prejudiced. Similarly, if the executor rejects the survivor's claim, or accepts it at a

⁹⁹⁴ [2015] 4 All SA 805 (GP).

⁹⁹⁵ [2011] 2 All SA 635 (KZP).

⁹⁹⁶ 1990(272) *De Rebus* 534.

⁹⁹⁷ This rule provides spouses with a mechanism that can be used during the interim period until a divorce is finalised. It relates inter alia to interim maintenance for the spouse and/or children. Rule 58 of the Magistrate's court contains a similar provision.

⁹⁹⁸ 1990(272) *De Rebus* 534.

reduced amount, he or she might feel aggrieved. The executor is placed in a position where he or she effectively has to make a judgement on whether items claimed by the survivor as expenses, for example entertainment, clothing accounts, cosmetics, pet food, gifts, newspapers and magazines, cell phone contracts, and the wages or salaries of domestic workers and gardeners⁹⁹⁹ can be regarded as reasonable. It is my submission that few executors are equipped to make such decisions.

Where the executor is also an heir or creditor in the estate, the issue of objectivity and impartiality plays a pivotal role. In *Van Niekerk v Van Niekerk*¹⁰⁰⁰ the court dealt with an application to have the executor of a deceased estate removed from her office in terms of section 54(1)(a)(v) of the Estates Act. The executor was the former wife of the deceased and also the sole heir of his estate. The executor resisted the maintenance claim lodged by the surviving spouse against the deceased estate. The court held¹⁰⁰¹ that an executor is obliged to exercise the powers granted in sections 32 and 33 of the Estates Act and to assess the merits of all claims “on a fair consideration of all the facts and its legal merits”. It held¹⁰⁰² that it would not be proper for the executor to reject claims against the estate unless he or she had some good reason to do so. If however, after a fair consideration of the claim, the executor found that there were grounds to dispute the claim, it would be proper for the executor to resist the claim.¹⁰⁰³ The court also held¹⁰⁰⁴ that the mere fact that an executor resists a claim, “even on fairly flimsy reasons”, will not be grounds to suggest that he or she is not properly fulfilling the duties as executor. It is only where it is clear from the executor’s conduct that he or she is using the office of executor to resist claims, regardless of their merits and without any “fair-minded” consideration, that the executor’s removal in terms of section 54(1)(a)(v)

⁹⁹⁹ These expenses were referred to in *Oosterbroek v Grobler* [2005] JOL 14792 (W).

¹⁰⁰⁰ [2011] 2 All SA 635 (KZP).

¹⁰⁰¹ At 640.

¹⁰⁰² At 640.

¹⁰⁰³ At 640.

¹⁰⁰⁴ At 640.

of the Estates Act will be considered.¹⁰⁰⁵ The judge mentioned that this will particularly be the case where it appears that the executor's motive for his or her conduct is to obtain a financial benefit in his or her capacity as heir.¹⁰⁰⁶ The court ordered that the executor be removed from office as her conduct had demonstrated that she was incapable of exercising the required level of impartiality and treating the MSSA claim fairly.

In *Jewaskewitz v Master of the High Court Polekwane* (sic)¹⁰⁰⁷ the court considered whether the Master's conclusion that he could not decide whether the surviving spouse qualified for maintenance as provided for by the MSSA, as the determination of the amount was not within his area of expertise, was a competent direction in terms of the provisions of section 35(9) of the Estates Act.¹⁰⁰⁸ It commented¹⁰⁰⁹ that the Master is not a judicial officer and could not on the basis of the facts be expected to adjudicate whether a maintenance claim should be allowed or rejected, as this would not be fair or in the interests of justice.¹⁰¹⁰ The court accordingly held¹⁰¹¹ that the Master was entitled to refer the matter to a court for adjudication. The court then considered the factors in section 3 of the MSSA and held that the only way it would be in a position to consider the survivor's claim was if an actuarial calculation was provided to enable it to determine and quantify the needs of the survivor.¹⁰¹² Such a calculation had not been made available and the court held¹⁰¹³ that, rather than referring it back to the Master for a decision, the matter should be referred to evidence "to ensure a just and expeditious decision". Based on my personal experience in the administration of

¹⁰⁰⁵ At 640.

¹⁰⁰⁶ At 640. See also De Waal "The law of succession (including the administration of estates) and trusts" 2009(1) *Annual Survey of South African Law* 1054.

¹⁰⁰⁷ Unreported, case number 53514/2012 [2013] ZAGPPHC 118, judgment delivered on 16 May 2013.

¹⁰⁰⁸ See 2.5.2.9 for a detailed discussion of this section.

¹⁰⁰⁹ Par 8.

¹⁰¹⁰ See also *Broodryk v Die Meester* 1991 (4) SA 825 (C); *Ferreira v Die Meester* 2001 (3) SA 365 (O); *LAWSA* vol 31 "Wills and succession" 453.

¹⁰¹¹ Par 9.

¹⁰¹² Par 14.

¹⁰¹³ Par 16.

estates, informal discussions with estates officers, the views of Costa and the views expressed in *Jewaskewitz v Master of the High Court Polekwane* (sic),¹⁰¹⁴ it is my submission that the average executor does not have the required skill and expertise to assess whether a claim for maintenance is reasonable.

4.4.6 No right of recourse

The MSSA provides¹⁰¹⁵ that the survivor has no right of recourse against any person to whom money or property was paid, delivered or transferred in terms of section 34(11)¹⁰¹⁶ or 35(12)¹⁰¹⁷ of the Estates Act or pursuant to an instruction of the Master in terms of section 18(3)¹⁰¹⁸ or 25(1)(a)(ii)¹⁰¹⁹ of the said Act. This means that, where the survivor's maintenance claim is not lodged before the estate falls open for distribution, or if it is lodged but not accepted and he or she fails to take any further steps in this regard, he or she has no recourse once the estate has been distributed in terms of any of the aforementioned sections.¹⁰²⁰ In a solvent deceased estate, the estate falls open for distribution once the liquidation and distribution account has lain open for inspection by interested parties.¹⁰²¹ Once the executor has distributed any asset of the deceased estate in accordance with the liquidation and distribution account, the survivor cannot use the *condictio indebiti* as it does not apply against an heir or legatee.¹⁰²² The reason for this was explained in the Law Commission Report, where it

¹⁰¹⁴ Unreported, case number 53514/2012 [2013] ZAHPPHC 118, judgment delivered on 16 May 2013.

¹⁰¹⁵ Section 2(2).

¹⁰¹⁶ This section applies to payments to creditors and distributions to heirs in an insolvent deceased estate.

¹⁰¹⁷ This section applies to payments to creditors and distributions to heirs in a solvent deceased estate.

¹⁰¹⁸ This section applies where the value of the estate does not exceed R250 000: see 4.3.2.

¹⁰¹⁹ This section applies where the deceased is not resident in South Africa at the time of his or her death and owns no property other than movable property in South Africa. The Master may, subject to certain provisions that are not relevant for this discussion, appoint an executor to liquidate and distribute the estate and give directions as to the manner in which it shall be done.

¹⁰²⁰ Heaton & Kruger 118.

¹⁰²¹ See 2.5.2.7 and 2.5.2.8 for more details of the time frame within which the account should be lodged and the inspection period.

¹⁰²² Botha *et al* 58; Meyerowitz 15.79A.

was noted¹⁰²³ that the provision that a minor child who has a claim for maintenance can claim maintenance from an heir or legatee to whom payment was made from the estate, even after the estate has been distributed in terms of the liquidation and distribution account,¹⁰²⁴ is a drastic rule which can prejudice an heir or legatee. In the case of a minor child this rule could be justified, but the Commission felt¹⁰²⁵ that a surviving spouse who unreasonably delays lodging a claim for maintenance against the estate probably does not have a serious need for support, and a right of recourse would therefore not be justified. It also felt that, where the need for maintenance only arose after the death of the other spouse, legal certainty and equity dictated that the surviving spouse should not be able to claim from the heirs or legatees to whom a valid distribution had been made.¹⁰²⁶ It therefore felt that a provision in the MSSA precluding a right of recourse against anyone to whom a valid distribution had been made should be sufficient. As Keyser¹⁰²⁷ points out, although the MSSA does not prescribe a time limit within which the claim must be lodged, the lack of a right of recourse will serve as an incentive for the surviving spouse to lodge the claim as soon as reasonably possible after the spouse's death.

As noted above,¹⁰²⁸ the MSSA does not provide a mechanism whereby the maintenance claim can be re-assessed if the circumstances of the survivor change to such an extent that it impacts on the *quantum* of the maintenance claim. If the survivor's claim is therefore accepted by the executor and the distribution of the deceased estate is effected accordingly, the survivor cannot at a later stage act against a creditor or heir of the estate if his or her circumstances change to such an extent that the amount or assets received in settlement of his or her claim is insufficient.

¹⁰²³ Par 6.23.

¹⁰²⁴ *Bank v Sussman* 1968 (2) SA 15 (O); *Couper v Flynn* 1975 (1) SA 778 (R).

¹⁰²⁵ Par 6.23.

¹⁰²⁶ Par 6.24.

¹⁰²⁷ "Maintenance of surviving spouses" 1990(1) *Annual Survey of South African Law* 5.

¹⁰²⁸ In 4.4.4.

4.4.7 Order of preference of the claim

A claim by the surviving spouse in terms of the MSSA ranks in the same order of preference in relation to other claims against the estate as the claim for maintenance of a dependent child.¹⁰²⁹ A claim of a dependent child is subordinate to the claims of the creditors of the estate¹⁰³⁰ and it therefore follows that the claim by the surviving spouse is also subordinate to the claims of creditors. The claims of the creditors must therefore be settled before any claim for maintenance by a dependent child or the surviving spouse can be settled. This order of preference is based on the fact that claims by creditors are generally in respect of monies already owing to them at the time of death, whereas the minor child or surviving spouse's claim is in respect of maintenance requirements that only originate after the death of the deceased parent or spouse.¹⁰³¹ As a result of the same order of preference, the claims of the minor child or children and the surviving spouse must be reduced proportionately if there are insufficient assets to settle the claims in full.¹⁰³² As Corbett, Hofmeyr and Kahn¹⁰³³ mention, this provision is in accordance with established practice where there is competition between the claim for maintenance of a dependent child and the claim for maintenance of a former spouse under a divorce order that continues because the order does not expressly provide that it comes to an end on the death of the maintenance debtor.

In view of the fact that the definition of "survivor" includes a spouse of a customary marriage which was dissolved by a civil marriage entered into by the husband to another woman, and the fact that the RCMA confers full legal recognition on *de facto*

¹⁰²⁹ Section 2(3)(b); *Oosterbroek v Grobler* [2005] JOL 14792 (W).

¹⁰³⁰ *Shearer v Shearer* 1911 CPD at 819; *Ex parte PittKennedy's Estate* 1946 NPD 776; *In re Estate Visser* 1948 (3) SA 1129 (C); *Ex parte Insel* 1952 (1) SA 71 (T); *Ex parte Zietsman: In re Estate Bastard* 1952 (2) SA 16 (C); *Lloyd v Menzies* 1956 (2) SA 97 (N); *Christie v Estate Christie* 1956 (3) SA 659 (N); *Oshry v Feldman* [2011] 1 All SA 124 (SCA); *Abrie et al* 113.

¹⁰³¹ *Carelse v Estate de Vries* (1906) SC 532; *In re Estate Visser* 1948 (3) SA 1129 (K); *Glazer v Glazer* 1963 (4) SA 694 (A) 706–707; *Beinart* 1958 *Acta Juridica* 106–110; *Sonnekus* 1990-3 *TSAR* 504.

¹⁰³² Section 2(3)(b); *Oosterbroek v Grobler* [2005] JOL 14792 (W) at 12; *LAWSA* vol 16 "Marriage" 108; vol 31 "Wills and succession" 452.

¹⁰³³ 46 fn 105.

polygynous customary marriages, there is of course the possibility that there could be more than one spouse who claims maintenance from the estate.¹⁰³⁴ Should this happen and there are insufficient assets in the estate to settle the claims of all the spouses, the claims will be reduced proportionately. The same will apply if there are competing claims by a minor child or children and multiple spouses. Roux¹⁰³⁵ makes a brief reference to a question about the constitutionality of this order of preference when a spouse (or spouses) and a minor child have claims but does not discuss it any further. This is an interesting question but falls outside the scope of this thesis and will therefore not be discussed.

4.4.8 Conflict of interest

Where the surviving spouse is in need of maintenance and is also the parent of a minor child of the deceased, it is quite conceivable that his or her position as spouse could be in conflict with his or her position as guardian of the minor child. The SA Law Commission Report¹⁰³⁶ noted that a question had been raised as to whether provision should be made for the appointment of a *curator ad litem* to represent the minor children's interests in such cases. The Commission felt that the surviving spouse in such a case would in any event be liable for the support of the minor children and his or her interests and those of the children would therefore coincide. It accordingly concluded¹⁰³⁷ that there was no need to make specific arrangements in this regard.

Although the MSSA contains no specific reference to the appointment of a *curator ad litem* to protect a minor child's interest, it does contain a provision that applies to such a scenario. Section 2(3)(c) provides that, in the event of a conflict between the interest of the survivor in his or her capacity as claimant and his or her capacity as guardian of a

¹⁰³⁴ See 5.1-5.3 for a detailed discussion of "spouse" and "survivor".

¹⁰³⁵ 2013(536) *De Rebus* 228.

¹⁰³⁶ Par 6.8.

¹⁰³⁷ Par 6.8.

minor dependent child, the Master may defer the survivor's claim for maintenance until the court has decided on the claim. It is not clear exactly what is envisaged by a deferment of the claim, but it appears evident from the reference to "the court" that the claim shall in such an instance be determined by a court of law. It is, however, not clear whether the Master should refer the claim to the court, or whether the executor should do so. Costa¹⁰³⁸ mentions that deferment of the claim may cause severe hardship, which is contrary to the intention of the legislature. I assume that this comment should be seen in light of his earlier reference¹⁰³⁹ to the Master's office not being equipped to deal with maintenance claims – if this is indeed the case, it could probably be expected that the Master would refer most such instances for a decision by the court, which would add significant delays to the process and have significant cost implications. I am not aware of any instance where the Master has done this and it appears that the Master in practice seldom follows this route.¹⁰⁴⁰

The MSSA fails to recognise other potential conflicts of interest that the executor may face or to provide guidance for dealing with such conflicts. An executor who is also the surviving spouse of the deceased would have a conflict of interest if he or she instituted a claim under the MSSA. A conflict would also arise if the executor was a beneficiary under the deceased's will or in terms of the intestacy rules, or if the executor was a relative of the surviving spouse or a beneficiary. In *Van Niekerk v Van Niekerk*¹⁰⁴¹ the executor was the sole heir of the estate. The court, in an application to have the executor removed from her office, found that she had demonstrated that she was incapable of exercising the required level of impartiality and treating the MSSA claim by the surviving spouse fairly. The court accordingly ordered that the executrix be removed from her office.

¹⁰³⁸ 1990(272) *De Rebus* 534.

¹⁰³⁹ See 4.4.5.

¹⁰⁴⁰ See 7.3.1 and 7.3.2 for a detailed discussion of interviews with estates officers and practitioners.

¹⁰⁴¹ [2011] 2 All SA 635 (KZP).

4.5 Conclusion

The MSSA places an onerous responsibility on the executor. He or she must not only examine the maintenance claim to determine its validity but must also decide whether the survivor's needs as claimed, are reasonable. There is no indication in the Parliamentary debates why Parliament chose to place the responsibility on the executor, but the Law Commission discussed this point in some detail.¹⁰⁴² It concluded that the Estates Act contained an established procedure for dealing with claims and there was no reason to provide for a special procedure to deal with maintenance claims by the surviving spouse. In terms of this procedure, the survivor would still have the option to approach a court of law if he or she was dissatisfied with the way in which the executor dealt with the claim. By having a court of law as a last resort in the event of a dispute only, unnecessary costs and a delay in the winding up of the deceased estate could be avoided. This was regarded as a practical approach, especially as the Law Commission viewed the incidence of surviving spouses being left indigent as the exception and therefore did not anticipate many such claims.¹⁰⁴³

As already indicated, I am of the opinion that the average executor does not have the skills or mechanisms to decide whether a maintenance claim is reasonable. As referred to in *Oosterbroek v Grobler*,¹⁰⁴⁴ there are very few court cases that deal with the maintenance claim in terms of the MSSA and most of the decided cases deal with the status of relationships other than marriage.¹⁰⁴⁵ The cases mentioned in this chapter are the only ones I could find on the actual maintenance claim and there is accordingly very little guidance in case law for the executor. If, as the court found in *Jewaskewitz v*

¹⁰⁴² South African Law Commission *Review of the law of succession: the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse* Project 22, par 6.18-6.22.

¹⁰⁴³ Par 6.20.

¹⁰⁴⁴ [2005] JOL 14792 (W).

¹⁰⁴⁵ See 5.1-5.3 for a detailed discussion of this aspect and the relevant cases.

Master of the High Court Polekwane (sic),¹⁰⁴⁶ the Master is not a judicial officer and cannot be expected to determine whether a claim for maintenance should, on consideration of the facts and the law, be allowed or rejected, I have to question on what basis the average executor is expected to make such a determination. The approach of the Master and the court to a claim under the MSSA was highlighted in *Friedrich v Smit*.¹⁰⁴⁷ The surviving spouse lodged a claim against the estate of her deceased spouse. The heirs nominated in the deceased's will were of the view that her claim, amounting to approximately 64 percent of the estate value, was disproportionate to the amount payable to them as heirs, and that the amount claimed could not be justified. They accordingly lodged an objection against the liquidation and distribution account in which the claim was reflected. The Master sustained the objection but indicated that the objection lacked sufficient information to determine the *quantum* of the claim and that it had to be agreed on by the parties or by a relevant court. The heirs approached the High Court in terms of section 35(10) of the Estates Act for an order setting aside the Master's finding, substituting it with an order sustaining the objection and an order that the liquidation and distribution account be amended to remove the claim by the surviving spouse. The court¹⁰⁴⁸ stated that there was no evidence on which it could find the reasonable maintenance to which the surviving spouse would be entitled, yet it held that the surviving spouse was entitled to reasonable maintenance. It did, however, hold that it could not determine the amount of the claim as there was insufficient information at its disposal. The heirs appealed to the Full Court,¹⁰⁴⁹ which agreed with the trial court that the surviving spouse was at least entitled to some level of maintenance from the deceased estate, even though she had not proven that she was entitled to maintenance. In a surprising ruling, it set aside the order of the trial court and substituted it with an order that the Master's decision be reviewed and set aside, and the matter remitted to the Master to determine the *quantum* of the claim. It

¹⁰⁴⁶ Unreported, case number 53514/2012 [2013] ZAGPPHC 118, judgment delivered on 16 May 2013 at par 8.

¹⁰⁴⁷ [2015] 4 All SA 805 (GP).

¹⁰⁴⁸ [A1056/2013] ZAGPPHC 1006.

¹⁰⁴⁹ [2015] 4 All SA 805 (GP).

is not clear why the court was of the view that the Master should determine the *quantum*, especially in light of the fact that the Master had initially indicated that there was insufficient information for it to determine the amount. The matter was taken on appeal¹⁰⁵⁰ and the court held that both the trial court and the Full Court erred in their approach to the matter – as both found that the surviving spouse had not provided evidence that she was entitled to reasonable maintenance, there was no basis for the orders granted by them.

This case is a good indication of the difficult position an executor is in when having to assess a claim under the MSSA and I believe it supports my suggestion that the average executor should not be expected to be able to assess such claims. The MSSA also does not give sufficient guidance to executors, and the lack of court cases on this matter means that there is relatively little legal certainty. In addition, judgments such as *Oshry v Feldman*¹⁰⁵¹ make it even more difficult for the executor to properly execute the duties attached to his or her office. Sonnekus¹⁰⁵² is of the opinion that the reason for the relative lack of reported judgments on the MSSA may be that section 3(a) provides that the proof and disposal of a maintenance claim are to be dealt with in terms of the Estates Act. The executor has to decide whether a claim is valid and the lack of reported judgments indicates that claims are being dealt with satisfactorily by the executors.¹⁰⁵³ I have a contrary view. Having dealt with the administration of deceased estates, I am inclined to think that the lack of judgments has more to do with financial reality than general satisfaction with the way in which claims are handled by the executor. It is in all likelihood rather a result of dissatisfied parties choosing not to fight a decision by the executor in a court of law, than of satisfaction by the way in which the maintenance claim is being dealt with. A survivor who truly does not have the means to maintain him- or herself is unlikely to have the means to litigate if the executor denies his or her claim

¹⁰⁵⁰ *Van Rooyen Friedrich v Louw Smit* 2017 (4) SA 144 (SCA).

¹⁰⁵¹ [2011] 1 All SA 124 (SCA).

¹⁰⁵² 2010-4 TSAR 813.

¹⁰⁵³ 2010-4 TSAR 813.

or accepts it at a reduced amount. The lack of litigation is therefore in itself not absolute proof that executors are dealing with the claims in a satisfactory manner. These issues are explored in more detail in chapter 7.

As indicated in chapter 1, the practical application of the MSSA is not without problems. It is evident from the discussion in this chapter, that there are certain key aspects of the MSSA that could lead to issues, namely the meaning of reasonable maintenance, the perceived uncertainty as to whether the claim can be settled by way of a lump sum payment, the lack of a mechanism to recover unutilised funds on the death or remarriage of the survivor, the role of the executor in assessing and determining the claim, especially if he or she has a conflict of interest, and the inconsistent approach by the courts when dealing with different relationships. I will consider these aspects in more detail in chapter 6 when I compare similar legislation in England and New Zealand.

CHAPTER 5

AN ANALYSIS OF THE LEGISLATIVE AND JUDICIAL TREATMENT OF UNRECOGNISED MARITAL AND NON-MARITAL RELATIONSHIPS

5.1 Introduction

The MSSA affords a maintenance claim to a “survivor”, which is defined in terms of marriage and it is therefore important to determine which relationships qualify as marriages in our law and which do not. The previous chapter dealt with relationships that qualify as marriages and in this chapter, I discuss relationships that are not fully recognised as marriages. Some of these relationships have been brought into the ambit of the MSSA, although these relationships are not fully recognised marriages. I will explain in this chapter which of the unrecognised marital relationships and non-marital relationships fall within the ambit of the MSSA and discuss how this state of affairs came about.

The family as a unit has traditionally been regarded as the cornerstone of society.¹⁰⁵⁴ Family law recognises the importance of the family as a social unit worthy of protection. The concept of family has, however, evolved from the so-called “nuclear” family of married parents with children to several other forms of family.¹⁰⁵⁵ Although the family as an institution is not protected in the Constitution of the Republic of South Africa, 1996¹⁰⁵⁶ (hereinafter referred to as “the Constitution”), the Constitutional Court has recognised it as a vital and important social institution that comes in many different shapes and sizes. In *Dawood v Minister of Home Affairs; Shalabi v Minister of Home*

¹⁰⁵⁴ Skelton & Carnelley (eds) 4.

¹⁰⁵⁵ Skelton & Carnelley (eds) 4; De Waal “The social and economic foundations of the law of succession” 1997(8)2 *Stell LR* 164.

¹⁰⁵⁶ 108 of 1996; Robinson “An overview of the provisions of the South African Bill of Rights with specific reference to its impact on families and children affected by the policy of apartheid” 1995(16) *Obiter* 106.

*Affairs; Thomas v Minister of Home Affairs, (“Dawood”)*¹⁰⁵⁷ the court indicated that one form of family may not be entrenched at the expense of other forms, when it stated:¹⁰⁵⁸

“Marriage and the family are social institutions of vital importance. ... Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well. The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends. The importance of the family unit for society is recognised in the international human rights instruments referred to above when they state that the family is the ‘natural’ and ‘fundamental’ unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.”

Before 1994 South African law defined¹⁰⁵⁹ “family” as a man and woman in a valid civil marriage, together with their children. Civil marriage had two key elements – it was a monogamous union between two persons of the opposite sex¹⁰⁶⁰ and it was concluded in terms of the Marriage Act.¹⁰⁶¹ The Marriage Act has been in operation since 1 January 1962 but has never defined the concept of “marriage”.¹⁰⁶² Our courts have therefore been forced to refer to the common law to define a marriage when confronted with a situation where doubt exists as to the validity in our law of a union between two

¹⁰⁵⁷ 2000 (3) SA 936 (CC).

¹⁰⁵⁸ At 858.

¹⁰⁵⁹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) 36; *Du Plessis v The Road Accident Fund* 2004 (1) SA 359 (SCA) 12; *Heaton & Kruger* 3; *Skelton & Carnelley* (eds) 5, 167; *Du Toit* 2009(126)3 *SALJ* 463.

¹⁰⁶⁰ *Ex parte Soobiah: In re Estate Pillay* [1948] 2 All SA 76 (N); *Heaton & Kruger* 3.

¹⁰⁶¹ 25 of 1961.

¹⁰⁶² *Skelton & Carnelley* (eds) 168.

persons.¹⁰⁶³ An example of this can be seen in *Ismail v Ismail*¹⁰⁶⁴ where the court held that a “marriage” solemnised in accordance with Islamic rites is not a valid marriage as it was not solemnised in terms of the Marriage Act. The court also stated that “...under our law, a marriage is the legally recognised voluntary union for life of one man and one woman to the exclusion of all others whilst it lasts ...”.¹⁰⁶⁵ Although the Marriage Act does not contain a definition for “marriage”, section 30 of the Act prescribes that the marriage officer must pose to each of the prospective spouses the default question whether they take each other “as lawful wife” or “as lawful husband” (as the case may be).

If consideration is given to the definition developed by the courts and the prescribed question to be asked by the marriage officer, it indicates that some relationships that fall outside the definition developed by the court were not traditionally regarded as marriages. These relationships are:

- A customary marriage concluded in terms of culture-based “customs and usages traditionally observed among the indigenous African peoples of South Africa”.¹⁰⁶⁶ A customary marriage is potentially polygynous¹⁰⁶⁷ as it allows the man to be married to more than one woman simultaneously.¹⁰⁶⁸ As such a marriage does not comply with the common law understanding of marriage as a monogamous union between one man and one woman, South African law historically did not recognise it as a valid marriage, except for certain limited purposes, which are not relevant for purposes of this thesis. Our law has, however, changed in this regard as the RCMA now extends full legal recognition

¹⁰⁶³ Skelton & Carnelley (eds) 168.

¹⁰⁶⁴ 1983 (1) SA 1006 (A).

¹⁰⁶⁵ At 1019 (H). See also *Seedat's Executors v The Master (Natal)* 1917 AD 302.

¹⁰⁶⁶ This is the definition of “customary marriage” and “customary law” in section 1 of the RCMA.

¹⁰⁶⁷ The term “polygyny” refers to the practice in terms of which a husband is allowed to take more than one wife. See Du Toit 2009(126)3 *SALJ* 470 fn 48.

¹⁰⁶⁸ Skelton & Carnelley (eds) 168 fn 2.

to customary marriages, whether monogamous or polygynous, and whether entered into before or after the RCMA;¹⁰⁶⁹

- Marriages in terms of religious rites that permit polygyny – the most common instances in South Africa are Muslim marriages and Hindu marriages;
- Same-sex partnerships – the reference to “one man and one woman” clearly excludes same-sex couples;
- Heterosexual partnerships between couples who choose to live together as husband and wife without entering into a marriage – although complying with the “one man and one woman” part of the marriage “definition”, these relationships were also excluded from the consequences of marriage as they were not solemnised in terms of the Marriage Act.

When the Interim Constitution¹⁰⁷⁰ with its Bill of Rights¹⁰⁷¹ and later also the Constitution came into operation, it brought far-reaching implications for family law.¹⁰⁷² The Bill of Rights applies to all law and the executive and judicial organs of state are bound by it.¹⁰⁷³ The operation of the Bill of Rights between the state and its subjects is referred to as vertical application. Section 8(2) of the Constitution, however, provides that the provisions of the Bill of Rights also operate horizontally, in that they bind a juristic or natural person if, and to the extent that, they are applicable. At least some of the rights that are guaranteed in the Bill of Rights enjoy horizontal application.¹⁰⁷⁴

For purposes of this thesis the most important constitutionally guaranteed rights are:

- The right to equality entrenched in section 9. This section states that everyone is equal before the law and has the right to equal protection and benefit of the

¹⁰⁶⁹ Botha *et al* 70; Heaton & Kruger 217; Skelton & Carnelley (eds) 180; Du Toit 2009(126)3 *SALJ* 473; Maithufi “*MM v MN* 2010 (4) SA 286 (GNP)” 2012(45)2 *De Jure* 405.

¹⁰⁷⁰ Constitution of the Republic of South Africa 200 of 1993 (“the Interim Constitution”).

¹⁰⁷¹ The first Bill of Rights was contained in chapter 3 of the Interim Constitution and the current Bill of Rights is contained in chapter 2 of the Constitution of the Republic of South Africa, 1996.

¹⁰⁷² Sinclair & Heaton 206.

¹⁰⁷³ Section 8(1).

¹⁰⁷⁴ Bonthuys “The South African Bill of Rights and the development of family law” 2002(119)4 *SALJ* 749.

law. Section 9(3) expressly prohibits unfair discrimination on the basis of *inter alia* marital status, sexual orientation, religion and culture;

- The right to human dignity entrenched in section 10;
- The right to freedom of religion, belief and opinion entrenched in section 15.

These rights, although guaranteed, are not absolute – in terms of section 36 of the Constitution they may be limited if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. As pointed out by the South African Law Reform Commission¹⁰⁷⁵ in its Discussion Paper on domestic partnerships, the need to harmonise family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity requires a balancing act.

With the introduction of the Bill of Rights our law had to redefine the concept of “family”, and the so-called “constitutional family” became part of the judicial and legislative landscape.¹⁰⁷⁶ Our courts have had to consider this concept both in the context of family law and the law of succession.¹⁰⁷⁷ The growing acceptance of different forms of family life can be seen in the legal recognition that has to date, both by legislation and the courts, been afforded to relationships that are not based on a civil marriage.¹⁰⁷⁸ Although the Bill of Rights does not provide for a fundamental right to marry, the inclusion of a right to equality and a prohibition against discrimination based on certain grounds have led to several judgments that extend the rights and privileges of spouses in civil marriages to partners in other types of relationships. There have also been changes to several pieces of legislation. These developments, however, happened piecemeal.¹⁰⁷⁹ What follows is a discussion of some of those relationships that are not recognised, or are only partially recognised, in our law and an analysis of how the

¹⁰⁷⁵ South African Law Reform Commission *Discussion Paper 104 Domestic partnerships* Project 118 Pretoria, 2003.

¹⁰⁷⁶ Du Toit 2009(126)3 *SALJ* 463.

¹⁰⁷⁷ Du Toit 2009(126)3 *SALJ* 46.

¹⁰⁷⁸ Krüger “Appearance and reality: constitutional protection of the institutions of marriage and the family” 2003(66)2 *THRHR* 287.

¹⁰⁷⁹ Skelton & Carnelley (eds) 169.

legislature and our courts have dealt with these relationships in the context of inheritance, maintenance or support in general, and the MSSA specifically.

5.2 Religious marriages

5.2.1 General

The most common unrecognised religious marriages in South Africa are Muslim and Hindu marriages. As was the case with customary marriages, our law traditionally did not recognise marriages in terms of religious custom as legal marriages because they are not solemnised in terms of the Marriage Act and are potentially polygynous.¹⁰⁸⁰ Polygyny was regarded as being against public policy.¹⁰⁸¹ It appears that this approach to Muslim marriages can be traced back as far as 1860 when the court in *Brown v Fritz Brown's Executors*¹⁰⁸² described Islamic marriages as “recognised concubinage”.¹⁰⁸³ It should be noted that the term “polygamy” is often used in the context of Muslim marriages – Moosa¹⁰⁸⁴ explains that this is because it is a gender neutral and generic term that covers both polygyny and polyandry.¹⁰⁸⁵ Muslim law, however, permits only polygyny and a reference to “polygamy” in terms of Muslim law is therefore incorrect.

The non-recognition of religious marriages was confirmed in several court cases, including *Seedat's Executors v The Master (Natal)*,¹⁰⁸⁶ *Vitamin Distributors v*

¹⁰⁸⁰ *Momeen v Bassa* 1976 (4) SA 338 (D); *Davids v The Master* 1983 (1) SA 458 (C); Heaton & Kruger 241; Moosa in Heaton (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2015) 284; Skelton & Carnelley (eds) 194.

¹⁰⁸¹ *Seedat's Executors v The Master (Natal)* 1917 AD 302; Skelton & Carnelley (eds) 194.

¹⁰⁸² 1860 3 Searle 313.

¹⁰⁸³ South African Law Reform Commission *Report on Islamic marriages and related matters* Project 59 Pretoria, 2000 fn 9 on 5.

¹⁰⁸⁴ “Polygynous Muslim marriages in South Africa: their potential impact on the incidence of HIV/AIDS” 2009(12)3 *PER/PELJ* 65 fn 2.

¹⁰⁸⁵ A plurality of husbands.

¹⁰⁸⁶ 1917 AD 302. In this case reference was made to the fact that a Muslim marriage was not regarded as a valid marriage in our law.

Chungebryen,¹⁰⁸⁷ *Ex parte Soobiah: In re Estate Pillay*,¹⁰⁸⁸ *Moola v Aulsebrook*,¹⁰⁸⁹ *Ismail v Ismail*,¹⁰⁹⁰ *S v Johardien*,¹⁰⁹¹ *Solomons v Abrams*,¹⁰⁹² *Kalla v The Master*.¹⁰⁹³

5.2.2 Legislative development

Several Acts have been amended to include a provision that they apply to religious marriages,¹⁰⁹⁴ for example the Births and Deaths Registration Act,¹⁰⁹⁵ the definition of “domestic relationship” in the Domestic Violence Act,¹⁰⁹⁶ and the definition of

¹⁰⁸⁷ 1931 WLD 55. In this case the court regarded a woman married by Hindu rites as an unmarried woman.

¹⁰⁸⁸ [1948] 2 All SA 76 (N). The court in this case confirmed that a marriage was a union of one man and one woman to the exclusion, while it lasts, of all others. It further held that a valid marriage had to be preceded by, and performed with certain formalities, such as being entered into in front of a recognised official and that a religious marriage does not comply with these formalities.

¹⁰⁸⁹ 1983 (1) SA 687 (N). The court held that Muslim marriages could qualify as putative marriages. This does not mean that the marriage is legal, but it does at least mean that some of the effects of a valid marriage apply to it. See also Sinclair 1981(98)4 SALJ 406.

¹⁰⁹⁰ 1983 (1) SA 1006 (A). The court held that a Muslim marriage and the contractual obligations that flowed from it could not be recognised and that there was no justification for deviating from the many decisions in which our courts refused to recognise polygamous unions or to give effect to the consequences of such unions. The court held further that the mere fact that a union is potentially polygamous renders it against public policy. It is interesting that, as mentioned by the court, at that time, less than two percent of the male Muslim population had more than one wife, which indicated that most Muslim marriages were in fact monogamous, and this means that a potentially polygynous union was therefore simply equated with a *de jure* polygynous union and not recognised as is evidenced by the decisions in *Seedat's Executors*. See also Moosa 2009(12)3 PER/PELJ 71 in this regard.

¹⁰⁹¹ 1990 (1) SA 1026 (C). The court held that a Muslim marriage did not have all the attributes of a registered marriage as it was potentially polygamous.

¹⁰⁹² 1991 (4) SA 437 (W). In this case the court, contrary to *Moola v Aulsebrook*, held that a Muslim marriage could not qualify as a putative marriage. This was because a putative marriage could not come into existence unless the parties took part in a marriage ceremony performed by a marriage officer as defined in the Marriage Act and, prior to 2014, most Imams (Muslim religious leaders) did not apply to be appointed as marriage officers in terms of the Marriage Act. It should be noted that more than 100 Imams were officially appointed as marriage officers in terms of the Marriage Act on 30 April 2014 after completing a course about the Marriage Act and writing an exam. The accreditation in terms of the Marriage Act enables Imams to officiate over marriage unions, which means that a monogamous Muslim marriage solemnised by an Imam duly registered as such in terms of the Marriage Act is therefore recognised as a valid civil marriage.

¹⁰⁹³ 1995 (1) SA 261 (T). The court held at 266A-D that a Muslim marriage was invalid at common law because it was potentially polygamous and therefore offended the *boni mores*.

¹⁰⁹⁴ Heaton & Kruger 242; Skelton & Carnelley (eds) 194.

¹⁰⁹⁵ 51 of 1992 (section 1(2)).

¹⁰⁹⁶ 116 of 1998.

“marriage” in the Children’s Act.¹⁰⁹⁷ Some Acts also contain sections that provide for their application to religious marriages, for example:

- Section 9(1)(f) read with section 1 of the Transfer Duty Act¹⁰⁹⁸ exempts immovable property inherited by a spouse in a religious marriage from the other spouse from transfer duty;
- The EDA includes in the definition¹⁰⁹⁹ of “spouse” a person in a union recognised as a marriage in terms of the tenets of any religion;
- The ITA includes in the definition¹¹⁰⁰ of “spouse” a partner in a union recognised as a marriage in accordance with the tenets of a religion;
- Section 3 of the Marriage Act allows the appointment of religious marriage officers to solemnise civil marriages according to certain religious rites, including “Mohammedan rites or the rites of any Indian religion”;
- Section 5A of the Divorce Act provides that a court may refuse to grant an order of divorce if it is clear that one or both spouses will be unable to remarry unless the civil marriage is also dissolved according to the rules of the spouses’ religious law.

5.2.3 Judicial development

5.2.3.1 Monogamous Muslim marriages

Since the introduction of the Bill of Rights, our courts have been forced to move away from the strict non-recognition of religious marriages.¹¹⁰¹ The first such example was *Ryland v Edros*¹¹⁰² where the court approached the matter by asking¹¹⁰³ whether, since the enactment of a post-democracy Constitution, a contract by parties in a factually

¹⁰⁹⁷ 38 of 2005.

¹⁰⁹⁸ 40 of 1949.

¹⁰⁹⁹ Section 1.

¹¹⁰⁰ Section 1.

¹¹⁰¹ Moosa in Heaton (ed) 287; Breslaw “Muslim spouses: are they ‘equally’ married?” 2013(537) *De Rebus* 246.

¹¹⁰² [1996] 4 All SA 557 (C).

¹¹⁰³ At 572.

monogamous marriage relationship entered into by them in terms of the rites of their religion, can still be held to be contrary to the accepted norms and usages which are regarded as morally binding on all members of our society. It held¹¹⁰⁴ that it could not and that courts should only label a contract as offensive to public policy if it is offensive to the values shared by the larger community and not just by one part of the community. It held¹¹⁰⁵ that the meaning of common law concepts such as *boni mores* and public policy should be informed by basic constitutional values such as freedom and equality. The court accordingly held¹¹⁰⁶ that the judgment in *Ismail v Ismail* was based on the views of only one group of South African society, which was unacceptable.¹¹⁰⁷ It held further¹¹⁰⁸ that the values of equality, tolerance of diversity and recognition of the plural nature of our society underlie the Constitution and “radiate” the concepts of public policy and *boni mores* that our courts have to apply. It therefore concluded¹¹⁰⁹ that the contractual obligations flowing from a *de facto* monogamous Muslim marriage can be recognised and enforced, despite the fact that the marriage is potentially polygynous, and that the *Ismail* decision did not preclude it from enforcing a claim that emanates from a marriage contract between Muslim spouses. This case was seen as a landmark decision as it rejected the judgment in *Ismail v Ismail*¹¹¹⁰ and opened the door for the extension of benefits to marriages in terms of religious rites.

In *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*¹¹¹¹ the Supreme Court of Appeal considered an action for loss of support brought by a widow married according to Islamic law after the death of her husband in a motor vehicle accident. The court *a quo* had dismissed the claim on the basis that the marriage did not qualify as a civil marriage and that there accordingly was

¹¹⁰⁴ At 572.

¹¹⁰⁵ At 573.

¹¹⁰⁶ At 574.

¹¹⁰⁷ Heaton & Kruger 231.

¹¹⁰⁸ At 573.

¹¹⁰⁹ At 576.

¹¹¹⁰ Skelton & Carnelley (eds) 196.

¹¹¹¹ [1999] 4 All SA 421 (A).

no legal duty of support between the parties. The Supreme Court of Appeal found¹¹¹² that Roman-Dutch law required a legally enforceable duty of support for an action for loss of support, and that the *boni mores* of society determine whether there is such a legally enforceable duty. The court noted¹¹¹³ that the question is whether the legal right of the widow in this matter to support from her husband during the marriage is a right which deserves recognition and protection by the law. It held¹¹¹⁴ that, as the marriage was a *de facto* monogamous marriage contracted according to the tenets of a major religion, the right to support had to be protected, as denying it would be inconsistent with “the new ethos of tolerance, pluralism and religion freedom”. The court referred to the shift in the identifiable *boni mores* of the community and held¹¹¹⁵ that it “must manifest itself in a corresponding evolution in the relevant parameters of application in this area”. It referred to a quote from *Du Plessis v De Klerk*¹¹¹⁶ where it was stated¹¹¹⁷ that “the common law is not to be trapped within the limitations of its past”. The court accordingly held¹¹¹⁸ that the common law constantly evolves to accommodate changing values and new needs. It should be noted that the court in *Amod* specifically mentioned¹¹¹⁹ that, although it placed emphasis on the *de facto* monogamous nature of the Muslim marriage in question, it did not mean that a claim for support by a widow in a polygynous marriage would necessarily fail, and left this question open for another court to decide.

Quite a few cases about maintenance of a spouse in a religious marriage after the dissolution of the marriage and the application of Rule 43¹¹²⁰ of the Uniform Rules of

¹¹¹² At 427.

¹¹¹³ At 428.

¹¹¹⁴ At 428.

¹¹¹⁵ At 430.

¹¹¹⁶ 1996 (5) BCLR 658 (CC).

¹¹¹⁷ At par 86.

¹¹¹⁸ At 430.

¹¹¹⁹ At 430.

¹¹²⁰ This rule provides spouses with a mechanism that can be used during the interim period until a divorce is finalised. It relates inter alia to interim maintenance for the spouse and/or children. Rule 58 of the Magistrate’s Court Rules contains a similar provision. The interim relief is applicable only to spouses in a civil marriage, but our courts have extended it to also apply to Muslim marriages.

the Supreme Court (now the High Court) have been decided over the past decade and a half. A few examples are:

- In *Jamalodeen v Moola*¹¹²¹ the applicant (*inter alia*) sought interim maintenance in terms of Rule 43 of the Uniform Rules pending finalisation of the main proceedings. The court held that interim maintenance had to be paid (albeit subject to certain conditions) despite the absence of a marriage in terms of the Marriage Act;
- In *Cassim v Cassim (Part A)*¹¹²² the court held that there was a duty on a husband in a Muslim marriage to maintain his wife in accordance with a general standard of living and that relief in terms of Rule 43 of the Uniform Rules was therefore available, even in a case where the main application was for an order directing that the Marriage Act was unconstitutional because of its failure to include Islamic marriages;
- In *AM v RM*¹¹²³ the applicant sought an order in terms of Rule 43 of the Uniform Rules for maintenance for herself and her minor child pending divorce proceedings. She and the respondent were married in terms of Islamic law and the respondent averred that Rule 43 did not apply because the marriage was not a marriage in terms of the Marriage Act. The court explained¹¹²⁴ that the rule applies whenever a spouse seeks relief from the court in respect of a pending matrimonial action. The question was therefore whether the present case could be regarded as a “pending matrimonial action”. The court referred¹¹²⁵ to several cases¹¹²⁶ where the courts had shown an increased tendency to enforce maintenance and other rights for spouses married in terms of Islamic law. It also

¹¹²¹ Unreported, case number 1835/06 (NPD), date unknown.

¹¹²² Unreported, case number 3954/06 (TPD), judgment delivered on 15 December 2006.

¹¹²³ 2010 (2) SA 223 (ECP).

¹¹²⁴ At par 4.

¹¹²⁵ At par 5.

¹¹²⁶ *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Commissioner for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA); *Daniels v Campbell* 2004 (5) SA 331 (CC); *Khan v Khan* 2005 (2) SA 272 (T).

- referred¹¹²⁷ to Rule 43 cases¹¹²⁸ which recognised the duty of a husband to support and maintain a wife pending a divorce action where the legality of the marriage was challenged. The court accordingly held¹¹²⁹ that the Muslim marriage did not preclude the applicant from obtaining relief in terms of Rule 43;
- In *Hoosein v Dangor*¹¹³⁰ the court held¹¹³¹ that a right of access to court is a fundamental right in terms of the Bill of Rights. Any rule, law or regulation which regulates such access should therefore be interpreted in a way that protects and promotes a right in the Bill of Rights. That meant that the word “spouse”, where used in Rule 43 of the Uniform Rules, included a spouse in a marriage that was concluded in terms of the tenets of Islamic personal law and such a spouse could therefore apply for maintenance pending the litigation;
 - In *Rose v Rose*¹¹³² the court dealt with the provisions of section 7(2) and (8) of the Divorce Act and specifically the question whether a wife in a Muslim marriage can invoke those sections to claim post-divorce maintenance and a share of her husband’s pension interest. The court relied on the reasoning in *Daniels v Campbell*¹¹³³ and *Hassam v Jacobs*¹¹³⁴ and held that the central question was whether the protection offered by a particular Act should be withheld from certain types of relationships. It held that it would be anomalous to hold that a party to a Muslim marriage qualifies as a spouse for purposes of the ISA and MSSA,¹¹³⁵ but not for the Divorce Act (which does not define “spouse”). This judgment has been described¹¹³⁶ as “ground breaking” as the applicant had married her husband under Islamic law when he was already

¹¹²⁷ At par 7.

¹¹²⁸ For example, *Cassim v Cassim (Part A)* Unreported, case number 3954/06 (TPD), judgment delivered on 15 December 2006; *Jamalodeen v Moola* Unreported, case number 1835/06 (NPD), date unknown.

¹¹²⁹ At par 13.

¹¹³⁰ 2010 (4) BCLR 362 (WCC).

¹¹³¹ At 370.

¹¹³² [2015] 2 All SA 352 (WCC).

¹¹³³ [2003] 3 All SA 139 (C).

¹¹³⁴ [2008] 4 All SA 350 (C).

¹¹³⁵ See the discussion below of *Daniels v Campbell* and *Hassam v Jacobs* for more details regarding the recognition of parties to a Muslim marriage as a spouse for purposes of these Acts.

¹¹³⁶ Harrington-Johnson “Muslim marriages and divorce” 2015(552) *De Rebus* 93.

legally married to another woman. This would of course mean that the Muslim marriage was in fact void and not just unrecognised,¹¹³⁷ and this would render the judgment incorrect. I submit, however, that the court's ruling was still of significant importance as it would have been correct and in line with other judgments had the Muslim marriage been valid;

- In *TM v ZJ*¹¹³⁸ the court held that the entitlement to maintenance stemmed from the general duty of a husband to support his wife and children. The wife could therefore bring an application for maintenance even though the husband alleged that he had pronounced *Talāq*¹¹³⁹ (divorce).

The first case that dealt specifically with the MSSA in the context of a Muslim marriage was *Daniels v Campbell*.¹¹⁴⁰ The applicant, Mrs Daniels, had been married to her husband in terms of Muslim rites since 1977. The marriage was at all times monogamous. Her husband passed away in 1994 without a will and the main asset in his deceased estate was a house in which the couple had lived. The applicant applied to the High Court for an order declaring that she was the spouse of her husband for purposes of the ISA and the MSSA. In the alternative, she asked that the omission in section 1(4) of the ISA and section 1 of the MSSA to provide for a husband or wife married in terms of Muslim rites in a *de facto* monogamous union is unconstitutional and invalid and that in both sections “spouse” and “survivor” should be read as if they included the surviving husband or wife of a *de facto* monogamous union in terms of Muslim rites.

Mrs Daniels contended that the ordinary meaning of “spouse” is clearly capable of including the surviving husband or wife of a *de facto* monogamous union in terms of

¹¹³⁷ See Heaton & Kruger 246 for a detailed explanation – the details are not relevant for this thesis.

¹¹³⁸ 2016 (1) SA 71 (KZD).

¹¹³⁹ There are different spellings for this term, but this spelling will be used in this thesis.

¹¹⁴⁰ [2003] 3 All SA 139 (C).

Muslim rites and that the “cultural chauvinism” shown in cases¹¹⁴¹ which refused to recognise Muslim marriages as valid marriages, or to recognise such parties as spouses, was incompatible with the *boni mores* of contemporary South Africa.¹¹⁴² She relied *inter alia* on the judgments in *Ryland v Edros* and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* as evidence of the changing approach by South African courts to marriages in terms of Muslim rites. She also relied on the various enacted or amended statutes which expressly recognised Muslim and other religious marriages for the purposes of conferring certain rights on parties, for example the Civil Proceedings Evidence Act,¹¹⁴³ the Criminal Procedure Act,¹¹⁴⁴ the Government Employees Pension Law,¹¹⁴⁵ and the Transfer Duty Act.¹¹⁴⁶ She argued that these legislative enactments and amendments, seen together with the change in South African public policy as evidenced in *Ryland* and *Amod*, indicated that there was no longer any legal basis to strain the ordinary meaning of “spouse” in the ISA and “survivor” in the MSSA to exclude Muslim spouses.

The court *a quo* held¹¹⁴⁷ that the judgment in *Ryland*, although “enlightened, progressive and constitutionally sensitive” could not be regarded as authority for a suggestion that a monogamous marriage by Muslim rites is a valid marriage or that the parties to such a union are to be recognised as spouses. I submit that this finding is correct in view of the court’s emphasis¹¹⁴⁸ in *Ryland* that its views were confined to contractual terms agreed to by parties in a *de facto* monogamous Muslim marriage. The court further held¹¹⁴⁹ that neither *Ryland* nor *Amod* dealt with the meaning to be

¹¹⁴¹ For example, *Bronn v Fritz Bronn’s Executors* (also referred to as *Brown v Fritz Bronn’s Executors*) (1860) 3 Searle 313; *Seedat’s Executors v The Master (Natal)* 1917 AD 302; *Dauids v The Master* 1983 (1) SA 458 (C); *Ismail v Ismail* 1983 (1) SA 1006 (A); *S v Johardien* 1990 (1) SA 1026 (C).

¹¹⁴² At 152.

¹¹⁴³ 25 of 1965.

¹¹⁴⁴ 51 of 1977.

¹¹⁴⁵ 21 of 1996.

¹¹⁴⁶ 40 of 1949.

¹¹⁴⁷ At 152.

¹¹⁴⁸ At 709D.

¹¹⁴⁹ At 152.

applied to the word “spouse” in South African legislation, that the legislative enactments and amendments have created explicit exceptions to the general rule that only marriages in terms of the Marriage Act have legal consequences, and that this reinforces the view that any reference to “spouse” in legislation must have its “traditional, limited meaning”, unless there is a deeming or interpretative provision in the statute.¹¹⁵⁰ It accordingly held¹¹⁵¹ that the word “spouse” in the ISA and “survivor” in the MSSA could not be interpreted as applying to a husband or wife in a *de facto* monogamous Muslim marriage.

Mrs Daniels’ alternative contention was that the failure of the ISA and MSSA to provide for Muslim spouses is unconstitutional and invalid as it violates the equality clause in the Constitution, and specifically the provision that no person shall be unfairly discriminated against on any one or more of the several stated grounds. In this case, her contention was that spouses in *de facto* monogamous religious marriages were being discriminated against on the basis of religion and culture and this was presumed to be unfair discrimination. The court referred¹¹⁵² with approval to the decision in *Harksen v Lane*¹¹⁵³ where the Constitutional Court explained the stages of enquiry that should be followed in any case involving the alleged violation of the right to equality, namely:

- Does the provision differentiate between people or categories of people?
If it does, does the differentiation bear a rational connection to a legitimate government purpose? If not, there is a violation of the right to equality and equal protection of the law. If it does bear a rational connection, it might nevertheless amount to discrimination;
- Does the differentiation amount to discrimination?
If the differentiation is founded on one of the specified grounds, there is discrimination. If it is not founded on one of the specified grounds, an objective

¹¹⁵⁰ At 157.

¹¹⁵¹ At 159.

¹¹⁵² At 162-163.

¹¹⁵³ 1998 (1) SA 300 (CC) par 53.

test is applied to determine whether it is founded on a ground that is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner;

- If the differentiation amounts to discrimination, is the discrimination unfair?
If it is on one of the specified grounds, unfairness is presumed. If it is on a ground that is not specified, the complainant will have to establish the unfairness – the test will focus on the impact of the discrimination on the complainant and others in his or her situation;
- If the discrimination is unfair, can it be justified under the provisions of the limitations clause of the Constitution?¹¹⁵⁴

Applying this test to the facts of the case, the court held:¹¹⁵⁵

- By interpreting “spouse” to mean only a party to a marriage recognised in South African law as having been solemnised in terms of the Marriage Act did indeed differentiate between a *de facto* monogamous marriage in accordance with Muslim rites and a marriage in terms of Christian or Jewish rites;
- The failure of South African law to accommodate Mrs Daniels’ religious beliefs and the cultural practices of her community placed her in a different position;
- As religion, culture and beliefs are prohibited grounds of discrimination in terms of section 8(2) of the Interim Constitution and 8(4) of the Constitution, such differentiation is presumed to be unfair discrimination, unless the contrary is established;
- The unfair discrimination leads to parties such as Mrs Daniels being economically impoverished in an unfair way and there does not seem to be any justification for such unfair discrimination.¹¹⁵⁶

¹¹⁵⁴ At the time of the judgment, section 33 of the Interim Constitution dealt with limitations. Now, limitations are governed by section 36 of the Constitution.

¹¹⁵⁵ At 164.

¹¹⁵⁶ At 172.

The court accordingly held¹¹⁵⁷ that the omission of “and includes the surviving husband or wife of a *de facto* monogamous union solemnised in accordance with Muslim rites” from “spouse” in the ISA and “survivor” in the MSSA was unconstitutional and invalid and that both definitions had to be read as if they included such words.

Mrs Daniels then applied to the Constitutional Court¹¹⁵⁸ for confirmation of the order. In the alternative (in case the court did not confirm the declaration of constitutional invalidity), she appealed against the order and argued that “spouse” should be interpreted to include a party to a monogamous Muslim marriage. Despite the two-legged approach, her counsel primarily argued¹¹⁵⁹ that a literal meaning of the word “spouse” included parties in a monogamous Muslim marriage and that a purposive interpretation of the ISA and the MSSA also supported such a view. The respondents contended¹¹⁶⁰ that the correct interpretation of these Acts was that “spouse” did not cover parties to a Muslim marriage. They further contended that this interpretation did not render the provisions unconstitutional as Mrs Daniels and her husband had the choice to conclude a marriage that was recognised under South African law and they chose to not do so.

A majority of eight judges set aside the High Court order, with two judges dissenting. The majority judgment was written by Sachs J. The court stated¹¹⁶¹ that the old interpretation of “spouse”, in terms of which a party to a Muslim marriage was excluded, did not flow from a situation where the courts gave the word its ordinary meaning, but rather “emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it”. It suggested¹¹⁶² that the interpretation of “spouse” to exclude Muslim spouses was attributable to the

¹¹⁵⁷ At 175.

¹¹⁵⁸ 2004 (5) SA 331 (CC).

¹¹⁵⁹ At 741.

¹¹⁶⁰ At 741-742.

¹¹⁶¹ At 742.

¹¹⁶² At 743.

undemocratic discriminatory approach that had been taken towards such marriages in the apartheid era and that such discriminatory interpretations were no longer sustainable in light of the Constitution. It further suggested¹¹⁶³ that the issue was not whether to impose a strain on the language of the Acts to achieve a constitutionally acceptable result, but whether to remove the strain that previous discriminatory interpretations had imposed on it, thereby applying its ordinary meaning.

The majority held¹¹⁶⁴ that the objectives of the ISA and MSSA are to provide relief to widows as a particularly vulnerable section of the population. They considered the constitutional values of equality, tolerance and respect for diversity against these objectives. They conceded that the Acts are gender-neutral, but suggested that South Africa's patriarchal culture in the past, which still operated at the time of the judgment, meant that it was easier for men to receive income and acquire property than it was for women. Referring to the common law position where a woman who had not been provided for in her husband's will or in terms of any other arrangement had no protection, they held¹¹⁶⁵ that there is no reason why the equitable principles behind the Acts should not apply to Muslim widows in the same way as they do to widows whose marriages were solemnised under the Marriage Act. They held¹¹⁶⁶ that the purposes of both the ISA and MSSA would be frustrated if surviving spouses to monogamous Muslim marriages were not included as spouses for purposes of the Acts, and that the central question was not whether Mrs Daniels was legally married but whether the protection which the ISA and MSSA intended widows (sic) to enjoy should be withheld from her relationship.¹¹⁶⁷ Sinclair and Bonthuys¹¹⁶⁸ question the majority's reference to "widow" and ask whether this implies that the Acts may be construed differently if the applicant was a man. I am of the view that the reference to "widow" is probably an error and used

¹¹⁶³ At 744.

¹¹⁶⁴ At 744.

¹¹⁶⁵ At 745.

¹¹⁶⁶ At 745.

¹¹⁶⁷ At 746.

¹¹⁶⁸ "Law of persons and family law" 2004(1) *Annual Survey of South African Law* 126.

only as a result of the context of the case with the applicant being a woman. I doubt that the judge intentionally used this word to differentiate between males and females as such differentiation would not make sense. The majority held¹¹⁶⁹ that an interpretation consistent with the ordinary meaning of “spouse”, that is in line with the spirit of the Constitution and furthers the objectives of the Acts, was to be preferred. They stated¹¹⁷⁰ specifically that the many recent (at that time) statutes that expressly included parties to a Muslim union when dealing with married persons, were indicative of a new approach consistent with constitutional values, rather than being indicative of a view that the absence of similar provisions in other Acts had any special significance. Both the ISA and MSSA were last amended long before the advent of the constitutional era and the lack of protection in those Acts should not be interpreted in such a way that Muslim parties were excluded from them.¹¹⁷¹

The majority then referred to the reasoning applied by the High Court when it found that it was bound by the decisions in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹¹⁷² and *Satchwell v President of Republic of South Africa*.¹¹⁷³ They suggested¹¹⁷⁴ that a proper reading of those cases did not lead to the conclusion that the term “spouse” could not encompass partners in a Muslim marriage. Both cases dealt with partners in a same-sex relationship, who at that time did not have the ability to enter into a marriage and therefore could not ordinarily be regarded as “married”, “husbands” or “wives”.¹¹⁷⁵ People married by Muslim rites however were married to each other, albeit it not under the Marriage Act. The majority held¹¹⁷⁶ that the crucial distinction was between married and unmarried persons and not, as suggested by the High Court, between persons married under the Marriage Act and those not so married.

¹¹⁶⁹ At 746.

¹¹⁷⁰ At 746.

¹¹⁷¹ At 747.

¹¹⁷² 2000 (2) SA 1 (CC).

¹¹⁷³ 2002 (6) SA 1 (CC).

¹¹⁷⁴ At 748.

¹¹⁷⁵ At 748.

¹¹⁷⁶ At 749.

The majority accordingly ordered¹¹⁷⁷ that the order of the High Court be set aside and that “spouse” in the ISA and “survivor” in the MSSA be read to include the surviving partner to a monogamous Muslim marriage. It should be noted that the court emphasised¹¹⁷⁸ that its judgment applied only to spouses in a monogamous Muslim marriage as it was not asked to deal with “the complex range of questions” concerning polygamous Muslim marriages.¹¹⁷⁹ It also stated¹¹⁸⁰ that it was not necessary for purposes of the case to consider the possible retroactive effect of upholding the appeal, and suggested that problems arising as a result of the judgment would have to be dealt with on a case-by-case basis.

Ngcobo J delivered a separate judgment, agreeing with the order proposed by Sachs J, but for different reasons. He reiterated¹¹⁸¹ that courts are obliged to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights and furthers its fundamental values. There are of course limits to this obligation as the interpretation should not be unduly strained.¹¹⁸² He held¹¹⁸³ that the interpretation of legislation must recognise the context in which we find ourselves and the constitutional values. He therefore held that a construction of the words “spouse” and “survivor” to include parties to a Muslim marriage was consistent with the object of the ISA and MSSA. He also held¹¹⁸⁴ that the decisions in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹¹⁸⁵ and *Satchwell v President of the Republic of South Africa*¹¹⁸⁶ were distinguishable from this case and that they did not preclude a

¹¹⁷⁷ At 750.

¹¹⁷⁸ At 750.

¹¹⁷⁹ At 750.

¹¹⁸⁰ At 750.

¹¹⁸¹ At 752.

¹¹⁸² At 752.

¹¹⁸³ At 754.

¹¹⁸⁴ At 756.

¹¹⁸⁵ 2000 (2) SA 1 (CC).

¹¹⁸⁶ 2002 (6) SA 1 (CC).

construction of “spouse” to include parties to a Muslim marriage. He accordingly agreed¹¹⁸⁷ with the judgment and the order of Sachs J.

The minority judgment written by Moseneke J held that the order of constitutional invalidity by the High Court should be confirmed and the appeal dismissed. The minority held¹¹⁸⁸ that a reading of “spouse” which includes the parties to a Muslim marriage “is unduly strained, not reasonably available and distorts the text”. The reasons for this view were as follows:

- The minority did not accept that the ordinary meaning of “spouse” refers to anyone other than a partner in a legally enforceable marriage;
- Prior to the Constitution our courts did not recognise Islamic marriages as valid marriages;
- Previous judgments by the Constitutional Court had given “marriage” and “spouse” a meaning at odds with the meaning advanced by the majority judgment;
- A significant number of post-Constitution statutes include the narrow meaning of “spouse” but “overcomes the omission of Muslim wives and husbands through interpretative aids”,¹¹⁸⁹
- The principle of separation of powers suggested that the omission had to be remedied by legislative rather than interpretive intervention.

The minority suggested¹¹⁹⁰ that the statutes and several Constitutional Court judgments¹¹⁹¹ that expressly recognise Muslim marriages reflected the changing norms in our society about family and marriage. They, however, did not agree with the submission that these statutes indicate that “spouse” is capable of a meaning that

¹¹⁸⁷ At 757.

¹¹⁸⁸ At 758.

¹¹⁸⁹ The reference to the statutes using interpretative aids is not correct as it is the courts that use these aids to interpret statutes.

¹¹⁹⁰ At 761.

¹¹⁹¹ For example, *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC).

includes Muslim spouses. In their view,¹¹⁹² the deeming provisions of extensions of the definitions actually indicate that the ordinary meaning is restricted to common law spousal relationships and that this meaning would apply in the absence of an expanded definition.¹¹⁹³ They referred¹¹⁹⁴ to the obligation placed on the courts to construe legislation to promote the spirit, purport and objective of the Bill of Rights, but held¹¹⁹⁵ that this duty is subject to the requirement that the interpretation “must not be fanciful or far-fetched” and must be reasonably capable of such compliant meaning. They quoted¹¹⁹⁶ the admonition by Kentridge AJ in *S v Zuma*¹¹⁹⁷ that “if the language used by the lawgiver is ignored in favour of a general resort to ‘values’, the result is not interpretation but divination”.

Moseneke J indicated¹¹⁹⁸ that he could not agree with the approach of the majority to the interpretation of the ISA and MSSA as it failed to distinguish properly between the interpretation of legislation under section 39(2) of the Constitution and the remedial measures provided in section 172(1)(b) of the Constitution, and because he could not agree that the ordinary meaning of “spouse” extended to persons in a relationship that is not recognised by our law as a marriage. He further held¹¹⁹⁹ that there was no basis for departing from the analysis used by the court in the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹²⁰⁰ and *Satchwell v President of the Republic of South Africa*¹²⁰¹ cases. He agreed¹²⁰² that the ISA and MSSA differentiate between different types of spouses and certain grounds and that the discrimination was unfair as these Acts withhold the economic protection extended to socially vulnerable widows of

¹¹⁹² At 761.

¹¹⁹³ At 762.

¹¹⁹⁴ At 762.

¹¹⁹⁵ At 763.

¹¹⁹⁶ At 763.

¹¹⁹⁷ 1995 (4) BCLR 401 (CC) at par 18.

¹¹⁹⁸ At 764.

¹¹⁹⁹ At 769.

¹²⁰⁰ 2000 (2) SA 1 (CC).

¹²⁰¹ 2002 (6) SA 1 (CC).

¹²⁰² At 770.

Christian, Jewish and secular civil marriages and customary unions from those unions that fall outside the ambit of these Acts. These Acts are therefore a breach of Mrs Daniels' right to equality on specific grounds and there is no justification for such a breach.¹²⁰³ The judge was, however, of the view that the matter was better suited for legislative intervention and that a "reading-in" remedy was more appropriate than a reinterpretation of the statutes. He accordingly agreed¹²⁰⁴ with the High Court that the Acts must be declared inconsistent with the Constitution and invalid as they do not include spouses in a *de facto* monogamous Muslim marriage. An order reading in the necessary words would therefore best deal with the applicant's right to dignity.¹²⁰⁵ As far as the issue of retroactivity was concerned, the judge also held¹²⁰⁶ that problems relating to retroactivity should be dealt with on a case-by-case basis.

Cooke¹²⁰⁷ suggests that South Africa's historical background explains why it was easy for the majority to find that it was not a linguistic strain to find that Muslim spouses are included as spouses for the ISA. Du Plessis & Penfold¹²⁰⁸ summarise this case by saying that the majority and minority essentially reached the same conclusion, but through different routes. They suggest that this shows that judges may well disagree on whether a statutory provision may reasonably bear a certain meaning but warn that the court should take care not to unduly strain the meaning of legislation by using the interpretative tool given to courts by section 39(2) of the Constitution. They nevertheless agree with the majority judgment.

I agree with Sinclair and Bonthuys¹²⁰⁹ that the minority judgment is to be preferred to that of the majority as I do not agree that excluding a Muslim spouse from the word "spouse" arises from a linguistic straining of the word as typically understood and

¹²⁰³ At 771.

¹²⁰⁴ At 772.

¹²⁰⁵ At 772.

¹²⁰⁶ At 772.

¹²⁰⁷ "Choice, heterosexual life partnerships, death and poverty" 2005(122)3 *SALJ* 550.

¹²⁰⁸ "Bill of Rights jurisprudence" 2004(1) *Annual Survey of South African Law* 27.

¹²⁰⁹ 2004(1) *Annual Survey of South African Law* 128.

employed in pre-democratic South Africa. I agree with Moseneke J that it cannot be accepted that the ordinary meaning of “spouse” relates to anybody other than a partner in a *legally recognised* marriage. As a Muslim marriage is not legally recognised, a spouse in such a marriage cannot be included as a “spouse” in terms of the MSSA, however fair and equitable this might be. I therefore agree with the minority judgment’s view that the words “a husband or wife married in accordance with Muslim rites in a *de facto* monogamous union” were to be read into the impugned legislation, for the reasons as quoted by Kentridge AJ in *S v Zuma*.

Keightley¹²¹⁰ mentions that the court’s failure to deal with the issue of retroactivity was a concern as far as it related to the administration of estates – both in relation to estates that had already been “wound up”¹²¹¹ and to those where the process was still ongoing. While the High Court had at least ordered¹²¹² (correctly or not) that estates that had at the time of the judgment been finally wound up were not impacted by the order in respect of the ISA, the Constitutional Court simply declared¹²¹³ that it was not necessary to deal with the possible retroactive effect of upholding the appeal and that any issues would have to be dealt with on a case-by-case basis. As Keightley¹²¹⁴ points out, this means that there will only be clarity on the impact of the judgment on estates when affected parties approach the courts for relief on a case-by-case basis, or when the legislature deals with this aspect of the judgment. As far as estates not yet finally liquidated and distributed at the time of the judgment are concerned, Keightley¹²¹⁵ points out that the order would be binding on executors and they would have to redraft the liquidation and distribution account to reflect “the awarding of a portion to the surviving spouse in terms of the Acts, which may lead to increased administrative burdens for executors and inevitable delays in finalising affected estates”. While I agree

¹²¹⁰ “Law of succession” 2004(1) *Annual Survey of South African Law* 476.

¹²¹¹ This refers to where the liquidation and distribution process has been finalised.

¹²¹² At 175.

¹²¹³ At par 38.

¹²¹⁴ 2004(1) *Annual Survey of South African Law* 476.

¹²¹⁵ 2004(1) *Annual Survey of South African Law* 476.

that this judgment does have a significant practical impact, I cannot agree that in all instances the liquidation and distribution account would have to be redrafted. The judgment in respect of the ISA will only apply to intestate estates. The MSSA requires the surviving spouse to lodge a claim for maintenance and to prove his or her need for such maintenance. It therefore does not follow that all liquidation and distribution accounts of Muslim spouses will necessarily have to be redrafted. It might well be, for whatever reason, that the surviving spouse does not lodge a claim for maintenance, which means there would be no need to redraft the liquidation and distribution account. What is, however, clear is that the judgment will lead to uncertainty until it is clear that no maintenance claim will be lodged, and this will inevitably add to the delay in finalising the estate.

Almost ten years after *Daniels v Campbell* the court had to deal with a similar matter. In *Faro v Bingham*¹²¹⁶ Ms Faro and Mr Ely were married in terms of Islamic rites in 2008. In August 2009 Mr Ely obtained a *Talāq* which dissolved the marriage. The *Talāq* was, however, revocable during the so-called '*Iddah* period. As Ms Faro was pregnant at that time, the '*Iddah* period would only expire when she gave birth to the child. Ms Faro averred that she and Mr Ely resumed intimacy shortly after August 2009 and that no further *Talāq* was pronounced before Mr Ely died in March 2010. With the help of the Women's Legal Centre ("WLC") she lodged a claim in terms of the MSSA against the estate of Mr Ely, but the executrix rejected the claim and lodged a liquidation and distribution account that contained no reference to Ms Faro. Ms Faro objected to the account on several grounds, one of which was that she should be treated as the spouse of Mr Ely and accordingly be a beneficiary of the estate in terms of the ISA and should be treated as his spouse in terms of the MSSA. The executrix maintained that the marriage had been dissolved before Mr Ely's death and the Master accordingly rejected Ms Faro's objection. Ms Faro approached the court for an order, *inter alia*, that the marriage subsisted at the time of Mr Ely's death and that she was accordingly a spouse

¹²¹⁶ [2013] ZAWCHC 159 (25 October 2013).

for purposes of the ISA and survivor for purposes of the MSSA. She also asked that the Master's decision to reject her objection to the liquidation and distribution account in Mr Ely's estate be set aside.

The court stated¹²¹⁷ that the main issue in this matter was whether or not the *Talāq* was valid as this would determine whether Ms Faro and Mr Ely were still married in terms of Islamic law at the time of his death. It found sufficient evidence to substantiate a finding that they were indeed still married at the time of Mr Ely's death. The court accordingly set aside¹²¹⁸ the Master's decision to disallow the objection and directed the executrix to amend the liquidation and distribution account to recognise Ms Faro's status as the spouse. Ms Faro had also asked the court to order that marriages solemnised according to Islamic law be deemed valid marriages in terms of the Marriage Act and, alternatively, that the common law definition of marriage be extended to include Muslim marriages. The court did not rule on these issues and postponed these matters for a hearing in another division of the court at a later date.¹²¹⁹

5.2.3.2 Polygynous Muslim marriages

The first case dealing with maintenance in the context of a polygynous Muslim marriage which was decided after the inception of the 1996 Constitution was heard in 2005. The (then) Transvaal Provincial Division of the High Court heard the case of *Khan v Khan*.¹²²⁰ This case was an appeal against a ruling by the Nelspruit Maintenance Court where the husband was ordered to pay maintenance to the wife in terms of the Maintenance Act.¹²²¹ The parties were married in terms of Islamic law and it appeared from the facts that the marriage was polygynous. The court¹²²² pointed out that polygynous marriages are accepted by the tenets of Islam, which is a major religion in South Africa, and that

¹²¹⁷ At par 29.

¹²¹⁸ At par 47(a).

¹²¹⁹ At par 47(c)(i).

¹²²⁰ 2005 (2) SA 272 (T).

¹²²¹ 99 of 1998.

¹²²² At par 10.5.

spouses in a Muslim marriage should therefore be protected by family law. It specifically mentioned¹²²³ that the purposes of the Maintenance Act would be frustrated if spouses in a polygynous marriage were excluded from the protection offered by the Act, just because the legal form of their relationship is inconsistent with the Marriage Act. It would be blatant discrimination not to recognise the duty of support arising from polygynous Muslim marriages while recognising it in terms of a monogamous Muslim marriage.¹²²⁴ The court accordingly held that spouses in a *de facto* polygynous Muslim marriage may invoke the provisions of the Maintenance Act.

The question of whether a surviving spouse to a polygynous Muslim marriage could claim maintenance in terms of the MSSA came before the court in 2008 in *Hassam v Jacobs*.¹²²⁵ Mrs Hassam and her husband were married in terms of Muslim rites in 1972. In 2000 her husband married another woman in terms of Muslim rites. He died in 2001, without leaving a valid will. Mrs Hassam submitted claims against his estate in terms of the ISA and the MSSA, but the executor refused to accept the claims on the basis that the marriage had been polygynous, and Mrs Hassam could accordingly not be treated as a spouse or survivor for purposes of the Acts. She approached the court for an order declaring that she was the spouse of her deceased husband and that the ISA and MSSA must be interpreted in such a way that surviving spouses of polygynous Muslim marriages are given the same benefits as those extended to surviving spouses of *de facto* monogamous Muslim marriages. In the alternative, she asked that the provisions of the ISA and MSSA be declared unconstitutional.

The legal position relating to polygynous marriages was summed up succinctly by the court.¹²²⁶ Before the advent of the new constitutional era, our courts had refused to recognise and give effect to polygynous marriages because they were considered to be

¹²²³ At par 11.12.

¹²²⁴ At par 11.11.

¹²²⁵ [2008] 4 All SA 350 (C).

¹²²⁶ At 353-354.

contra bonos mores from a public policy point of view. This view was, according to the court, attributable to the fact that polygyny was viewed “through the prism of the common law and the mores of a politically dominant but minority section of our society.”¹²²⁷

It should be noted that the issue was raised whether or not Mrs Hassam was indeed the spouse of the deceased as she admitted that she had obtained a *faskh*, which would have terminated the marriage on completion of a separation period of three months. She, however, averred that she and her husband had reconciled during the three months and the separation period had therefore not been completed. The court was satisfied that she had succeeded in proving that the marriage did indeed exist at the time of her husband’s death.¹²²⁸ In dealing with the question relating to the position of surviving spouses of a polygynous marriage, it referred¹²²⁹ to section 39(2) of the Constitution which provides that, when a court interprets legislation and develops the common law or customary law, it must promote the spirit, purport and objects of the Bill of Rights in a manner that gives effect to the fundamental values in the Bill of Rights, where possible. It also referred to the recognised principle of constitutional interpretation that, if it is reasonably possible to interpret an Act in a way that avoids inconsistency with the Constitution, such interpretation must be preferred. It held that if widows of polygynous Muslim marriages were to be excluded from the concepts of “spouse” and “survivor”, they would be discriminated against solely because of the fact that their husbands had exercised the right given by their faith to marry more than one woman. This discrimination would amount to violation of the women’s right to equality based on their religion, marital status and culture and would also violate their right to dignity.¹²³⁰ The court felt¹²³¹ that the considerations that were applied in *Daniels v*

¹²²⁷ At 354.

¹²²⁸ See Bakker “Toepassing van Islamitiese reg in Suid-Afrika” 2008(29)3 *Obiter* 533 for his views on why the court should not have regarded her as a spouse.

¹²²⁹ At 355.

¹²³⁰ At 356.

¹²³¹ At 356.

Campbell applied equally to widows in a polygynous Muslim marriage. It also referred¹²³² to a shift in legislative and judicial policy that had resulted in increasing recognition for polygyny practised in African customary law as well as in Muslim religious law. It accordingly held¹²³³ that the continued exclusion of polygynous marriages from the benefits of the ISA and the MSSA would amount to unfair discrimination against the spouses, which would be in conflict with section 9 of the Constitution.

The court considered the fact that every reference to “survivor” in the MSSA is preceded by the word “the”, which typically indicates the singular, but held¹²³⁴ that it had to take cognisance of section 6 of the Interpretation Act,¹²³⁵ which provides in subsection (b) that, in every law, words in the singular include the plural and *vice versa*, unless a contrary indication appears in the law. The court accordingly held¹²³⁶ that the mechanisms provided in section 2(3)(b) of the MSSA to determine how competing claims of the spouse and minor children must be dealt with, as well as section 3 which provides the factors to be considered when assessing the claim, are capable of being applied to polygynous marriages without unduly straining the language of the MSSA. It found¹²³⁷ support for its view in the fact that our courts had already found in *Kambule v Master of the High Court*¹²³⁸ that the provisions of the MSSA could be applied in the context of polygynous customary law marriages.

The court accordingly ordered¹²³⁹ that the word “survivor” in the MSSA includes the surviving partner to a polygamous Muslim marriage and that both Mrs Hassam and the other wife were, for purposes of the MSSA, survivors of the deceased. It is interesting

¹²³² At 356.

¹²³³ At 357.

¹²³⁴ At 357.

¹²³⁵ 33 of 1957.

¹²³⁶ At par 12.

¹²³⁷ At 357.

¹²³⁸ [2007] 4 All SA 898 (E). See 4.3.5 for more details of the judgment.

¹²³⁹ At 358.

that the court, although referring throughout the judgment to “polygynous”, referred to a polygamous marriage when making the order.¹²⁴⁰ Du Toit suggests¹²⁴¹ that, although the High Court’s reliance on section 6 of the Interpretation Act appears sound, it is not inconceivable that another court may in future rule that the words “or survivors” should be read in wherever the word “survivor” appears in the MSSA.

The High Court also had to deal with the application of the ISA and found that, except for section 1(4)(f), the provisions of the ISA could also be applied to spouses in a *de facto* polygynous marriage. It held that section 1(4)(f) was inconsistent with the Constitution as the section only provided for one spouse in a Muslim marriage to be an intestate heir of the deceased. The court accordingly held that the section was to be read as if the whole subsection was substituted by a subsection that provides for more than one spouse.

The Constitution provides¹²⁴² that an order of constitutional invalidity regarding an Act has no force until it is confirmed by the Constitutional Court, and the order of the High Court re section 1(4)(f) of the ISA therefore had to be referred to the Constitutional Court.¹²⁴³ The referral was limited to the order in respect of the ISA as that was the only finding of unconstitutionality in the High Court and the Constitutional Court¹²⁴⁴ therefore did not deal with the issue of the High Court’s interpretation of the MSSA. It would therefore appear that MSSA claims by spouses in a *de facto* polygynous marriage is permitted in terms of the High Court decision, although it should be noted that the latter is only binding on that jurisdiction¹²⁴⁵ and there is accordingly some uncertainty whether such claims will in fact be permitted.

¹²⁴⁰ See also De Waal 2009(1) *Annual Survey of South African Law* 1038 at 1044; Du Toit 2009(126)3 *SALJ* 470 fn 48.

¹²⁴¹ 2009(126)3 *SALJ* 472 fn 55.

¹²⁴² Section 172(2)(a).

¹²⁴³ Heaton 2009(1) *Annual Survey of South African Law* 486.

¹²⁴⁴ *Hassam v Jacobs* 2009 (5) SA 572 (CC).

¹²⁴⁵ Heaton & Kruger 243-244.

5.2.3.3 Hindu marriages

Hindu marriages are in the same legal position as Muslim marriages – they do not enjoy full legal recognition¹²⁴⁶ and only have the protection that is afforded to them by certain Acts and judgments.¹²⁴⁷ It appears that although traditional Hindu law permits polygyny, it rarely occurs in practice and monogamy has become the approved norm.¹²⁴⁸ The main reason therefore for not giving such marriages full recognition under our law is because they are not solemnised in terms of the Marriage Act.¹²⁴⁹

There are few cases dealing with Hindu marriages. The most notable one is *Govender v Ragavayah*,¹²⁵⁰ in which the applicant was the widow of a monogamous Hindu marriage which had not been registered in terms of the Marriage Act. The husband died without a valid will and the executor of his estate framed the liquidation and distribution account without any reference to the widow. She approached the court for an order declaring that “spouse” in terms of section 1 of the ISA includes the surviving party to a monogamous Hindu marriage. The court referred *inter alia* to the decision in *Daniels v Campbell* and held that that judgment and other court decisions provided judicial support for the proposition that a monogamous Hindu marriage had all the essentials of a valid marriage in terms of our law, as it is a voluntary union for life, between one man and one woman to the exclusion of all others. The court accordingly held that “spouse” in section 1 of the ISA includes the surviving partner of a monogamous Hindu marriage.

¹²⁴⁶ In *Vitamin Distributors v Chungbryen* 1931 WLD 55, for example, a woman married by Hindu rites was regarded as unmarried. See also *Rampatha v Chundervathee* 1957 (4) SA 483 (N); *Pillai v Pillai* 1963 (1) SA 542 (D). More recently in *Singh v Ramparsad* 2007 (3) SA 445 (D) the court refused to recognise the validity of a Hindu marriage for purposes of the Divorce Act. See also Rautenbach in Heaton (ed) 360.

¹²⁴⁷ The Acts or sections of Acts that afford recognition to Muslim marriages also apply to Hindu marriages.

¹²⁴⁸ Heaton & Kruger 249.

¹²⁴⁹ Heaton & Kruger 249.

¹²⁵⁰ 2009 (3) SA 378 (D).

As Heaton and Kruger¹²⁵¹ point out, this judgment did not come as a surprise in view of the recognition already extended to Muslim marriages and the fact that there is no constitutionally acceptable reason to give judicial recognition to Muslim marriages for specific purposes but not to Hindu marriages for those same purposes. If we accept the apparent outcome reached in 5.2.3.2 regarding the application of the MSSA to spouses in a *de facto* polygynous marriage, it follows that spouses in a Hindu marriage should be able to claim maintenance in terms of the MSSA on the same basis as spouses in a Muslim marriage may.¹²⁵² It should of course be noted that, although courts can recognise certain aspects of a Hindu marriage for certain purposes, they do not have the power to declare a Hindu marriage valid or to convert it into a civil marriage or civil union.¹²⁵³

5.2.4 Pending legislative development

The advent of the new constitutional dispensation has clearly had a significant impact on the way in which religious marriages are regarded. Section 15(3)(a)(i) and (ii) of the Constitution provides the foundation for the recognition and application of religious family law systems but does not give any religious group the right to have their system of family law recognised by the state. As a result, religious groups still have to lobby for legal recognition.¹²⁵⁴ Although progress has been made by the judiciary to develop and protect the rights of Muslim persons, especially women, this piecemeal approach is clearly not sufficient and legislative certainty is required.¹²⁵⁵

Under the new constitutional dispensation, numerous calls have been made for the full legal recognition of Muslim marriages. While litigation has made huge inroads towards

¹²⁵¹ *South African family law* 249.

¹²⁵² See also Heaton 2009(1) *Annual Survey of South African Law* 482 and the discussion that follows in 5.2.4.

¹²⁵³ *Singh v Ramparsad* 2007 (3) SA 445 (D).

¹²⁵⁴ Moosa 2009(12)3 *PER/PELJ* 71.

¹²⁵⁵ Rautenbach in Heaton (ed) 336.

the recognition of the consequences of Muslim marriages,¹²⁵⁶ court judgments have limited applicability and the need remains for legislation to govern Muslim marriages. The continuing calls led to the establishment of a Project Committee of the South African Law Reform Commission.¹²⁵⁷ The committee was tasked “to investigate Islamic marriages and related matters with effect from 1 March 1999 for the duration of the investigation”. The committee published a document¹²⁵⁸ with tentative proposals in May 2000 and it was circulated for public comment in July 2000. Various interested parties responded, and the result was the publication in December 2001 of a Discussion Paper,¹²⁵⁹ including a draft Bill. The closing date for comments was 31 January 2002. As a result of the responses received, the South African Law Reform Commission submitted a Report¹²⁶⁰ on Islamic Marriages with a draft Bill to the Minister of Justice and Constitutional Development in July 2003. In a media statement¹²⁶¹ the Commission explained that the Bill draws a clear distinction between an Islamic marriage and a civil marriage. The Bill only applies to Islamic marriages, but provision is made for Muslims who are married in terms of a civil marriage to elect to have the provisions of the Bill apply to them.

¹²⁵⁶ Abrahams-Fayker “Women’s Legal Centre” 41,
http://www.cci.uct.ac.za/usr/cci/news/big/Muslim_Marriages_Papers.pdf (last accessed 8 April 2016).

¹²⁵⁷ Shabodien “Making haste slowly: legislating Muslim marriages in South Africa” 31,
http://www.cci.uct.ac.za/usr/cci/news/big/Muslim_Marriages_Papers.pdf (last accessed 8 April 2016).

¹²⁵⁸ South African Law Commission *Issue Paper 15 Islamic marriages and related matters* Project 59 Pretoria, 2000.

¹²⁵⁹ South African Law Commission *Discussion Paper 101 Islamic marriages and related matters* Project 59 Pretoria, 2001.

¹²⁶⁰ South African Law Reform Commission *Report on Islamic marriages and related matters* Project 106 Pretoria, 2003.

¹²⁶¹ Media statement by the South African Law Reform Commission concerning its investigation into Islamic marriages and related matters (Project 59)
http://www.doj.gov.za/salrc/media/2003_prj59_media.pdf (last accessed 21 April 2019).

The Bill was subject to a great deal of criticism¹²⁶² and an amended version¹²⁶³ was published for public comment in January 2011. In the invitation to comment, the Law Reform Commission explained that the background of the Bill was to provide statutory recognition to Muslim marriages “in order to redress inequities and hardships arising from the non-recognition of these marriages”. The amended Bill provides¹²⁶⁴ that it will apply to marriages entered into after its commencement where the parties elect to be bound by it. If parties married before its commencement, it will apply unless the parties, within a period of 36 months or longer as prescribed, jointly elect not to be bound by it.¹²⁶⁵ Clause 8 provides that Muslim marriages to which the envisaged Act applies will be deemed to be out of community of property without accrual.

The Bill provides¹²⁶⁶ that a Muslim marriage to which the Bill applies and in respect of which all the requirements of the Bill are met is for all purposes recognised as a valid marriage. It specifically envisages¹²⁶⁷ that certain Acts be amended to include Islamic marriages. It *inter alia* provides that the definition of “spouse” in the ISA and “survivor” in the MSSA be amended to include spouse(s) in an Islamic marriage.

The amended Bill also led to severe criticism and division in the Muslim community.¹²⁶⁸ The main criticism seems to be that, although Islamic personal law and marriage are highly complex, the Bill makes no provision for the involvement of Muslim judges, scholars, jurists or duly qualified theologians when dealing with these issues.¹²⁶⁹ Another area of concern seems to be that the amended Bill provides that it applies to all

¹²⁶² See Amien “Overcoming the conflict between the rights to freedom of religion and women’s right to equality: A South African case study of Muslim marriages” 2006(28)3 *Human Rights Quarterly* 729, 746.

¹²⁶³ Muslim Marriages Bill 2010 General Notice 37 Government Gazette 33946, 21 January 2011.

¹²⁶⁴ Clause 2(1).

¹²⁶⁵ Clause 2(2).

¹²⁶⁶ Clause 2(5).

¹²⁶⁷ Clause 17.

¹²⁶⁸ Heaton “Family law” 2011(1) *Annual Survey of South African Law* 417 at 418.

¹²⁶⁹ Moosa in Heaton (ed) 288; Sader “The Muslim Marriages Bill” 2001(405) *De Rebus* 50; Heaton 2011(1) *Annual Survey of South African Law* 417.

individuals, unless they specifically indicate that it does not – there is a view¹²⁷⁰ that it should be the other way round, ie the Bill should only apply if an individual expressly selects application. I cannot agree with this reasoning – where legislation provides for its optional application, it usually provides that it applies unless parties select non-application.¹²⁷¹ In addition, Sader’s comment that the Bill applies “to all individuals” is not correct, as clause 2(1) clearly indicates that it will only apply to marriages entered into after the commencement of the Act if the parties select application.¹²⁷²

In addition, some Muslim bodies and individuals suggest that Shari’ah law should outweigh constitutional equality claims and that adjudication of Muslim disputes should remain in the hands of Muslims.¹²⁷³ This argument is flawed, as the right to equality in section 9 of the Constitution outweighs the right to religious freedom, which means that, should Muslim marriages be legally recognised, they will be subject to the Bill of Rights in the same way that other marriages are.¹²⁷⁴ As Heaton¹²⁷⁵ points out, the suggestion that a system of religious law should prevail over the provisions of the Bill of Rights is completely without merit in view of the provision in section 8(1) of the Constitution that the Bill of Rights applies to all law.

In 2009 the Women’s Legal Centre Trust applied¹²⁷⁶ for direct access to the Constitutional Court to seek an order that compelled the President and Parliament to enact legislation that recognises Muslim marriages. The court ruled that the application was “misconceived” as the obligation to enact legislation to fulfil constitutional rights

¹²⁷⁰ For example, Sader 2001(405) *De Rebus* 50.

¹²⁷¹ One example in the context of marriage is the Matrimonial Property Act which provides that the accrual system applies to marriages out of community of property unless the parties expressly exclude it.

¹²⁷² Neels “Constitutional aspects of the Muslim Marriages Bill” 2012-3 *TSAR* 488.

¹²⁷³ Heaton 2011(1) *Annual Survey of South African Law* 418; Schroeder F “Legal bid on Muslim marriages” Independent online 3 March 2011, <http://www.iol.co.za/news/south-africa/legal-bid-on-Muslim-marriages-1.1035844> (last accessed 15 April 2013).

¹²⁷⁴ Moosa 2009(12)3 *PER/PELJ* 71.

¹²⁷⁵ 2011(1) *Annual Survey of South African Law* 418.

¹²⁷⁶ *Women’s Legal Centre Trust v President of the Republic of South Africa* 2009 (6) SA 94 (CC).

rests in the first instance on the state and not only on the President and Parliament. It accordingly denied direct access to the Constitutional Court. During July 2011 the Department of Justice and Constitutional Development advised the Women's Legal Centre that they were evaluating comments and intended to obtain Cabinet approval of the legislation by late 2011. On 6 November 2012 the Women's Legal Centre asked the Department for a copy of the revised Bill, but the Department responded that there was no revised Bill yet as they were still considering the comments.¹²⁷⁷ The court in *Faro v Bingham*¹²⁷⁸ had ordered the Minister of Justice and Constitutional Development to file an affidavit setting out the progress that had been made with the enactment of the Muslim Marriages Bill and/or similar legislation. The Minister was given a deadline of 15 July 2014, but the deadline lapsed without an affidavit having been filed. The Women's Legal Centre indicated¹²⁷⁹ in February 2015 that they would launch litigation in the High Court that compels the State to enact legislation that recognises Muslim marriages. The litigation was eventually launched 19 months after the Women's Legal Centre first indicated their intention to do so. The case was a consolidation of three applications, one of which was by the survivor in *Faro v Bingham*. The case was supposed to be heard in the Western Cape High Court on 13 September 2016,¹²⁸⁰ but it was postponed to 20 March 2017.¹²⁸¹ It was eventually heard and judgment was given in August 2018.¹²⁸²

The Western Cape High Court outlined the historical treatment of Muslim marriages in South Africa and looked at the judicial development in this regard. It found¹²⁸³ that the applicant had shown that the treatment of Muslim marriages amounted to discrimination, that the discrimination is presumed to be unfair as it is on a listed

¹²⁷⁷ *Faro v Bingham* [2013] ZAWCHC 159 (25 October 2013) at par 42.

¹²⁷⁸ [2013] ZAWCHC 159 (25 October 2013).

¹²⁷⁹ "WLC turns to courts on Muslim Marriages Bill", <http://www.vocfm.co.za/wlc-turns-to-courts-on-muslim-marriage-bill/> (last accessed 18 July 2016).

¹²⁸⁰ As per e-mail dated 6 September 2016 from Hoodah Abrahams-Fayker, senior attorney at the Women's Legal Centre.

¹²⁸¹ *Die Burger* 21 September 2016.

¹²⁸² *Women's Legal Centre Trust v President of the Republic of South Africa* 2018 (6) SA 598 (WCC).

¹²⁸³ At par 134.

ground,¹²⁸⁴ and that the state had not shown any legitimate governmental purpose for the unfair discrimination.¹²⁸⁵ The continued non-recognition of marriages solemnised in terms of Islamic rites and beliefs infringe on the constitutional rights of equality and dignity.¹²⁸⁶ The court held¹²⁸⁷ that the state must fulfil its duty in terms of section 7(2) of the Constitution to “respect, protect, promote and fulfil the rights in the Bill of Rights” and the only reasonable way to do this in the context of this case is to enact legislation. It accordingly ordered¹²⁸⁸ the state to bring into operation legislation to recognise Muslim marriages as valid and to regulate the consequences of such recognition. The state was given a period of 24 months from the date of the order to do so, provided that, should the proposed legislation be referred to the Constitutional Court as provided for in the Constitution,¹²⁸⁹ the 24 months period would be extended until final determination by the Constitutional Court. Should the legislation not be enacted, a union validly concluded in terms of Sharia law (ie a Muslim marriage) may be dissolved in terms of the Divorce Act.

Rautenbach¹²⁹⁰ points out that, until legislation as proposed in the draft Bill is enacted, it will remain necessary to approach the courts for assistance. To date, the legislative intervention required by the High Court judgment has not been forthcoming and an appeal to the Supreme Court of Appeal was subsequently lodged.¹²⁹¹

As far as Hindu marriages are concerned, there has been no similar development.¹²⁹² As far back as 2006, the South African Law Reform Commission approved the inclusion of

¹²⁸⁴ At par 135.

¹²⁸⁵ At par 135.

¹²⁸⁶ At par 179.

¹²⁸⁷ At par 181.

¹²⁸⁸ At par 252.

¹²⁸⁹ Sections 79 and 80.

¹²⁹⁰ “Some comments of the current (and future) status of Muslim personal law in South Africa” 2004(7)2 *PER/PELJ* 101.

¹²⁹¹ The appeal was placed on the roll for 25 August 2020, but no judgment has yet been handed down. See <http://www.supremecourtofappeal.org.za/index.php/court-roll> (last accessed 4 December 2020).

¹²⁹² Rautenbach in Heaton (ed) 385.

an investigation into the recognition of such marriages in its program.¹²⁹³ To date, however, no progress has been made. It is anticipated that when the proposed legislation regarding the recognition of Muslim marriages is passed, it should lead to developments whereby other religious personal law systems such as Hindu law, can benefit and that there will then be similar progress towards the recognition of Hindu marriages. The court in *Women's Legal Centre v President of the Republic of South Africa* did mention¹²⁹⁴ that there appears to be an investigation by the Law Reform Commission with a view to develop a paper on a consolidated Marriage Act and that there had been talks about the formal recognition of Hindu marriages, but no details were given in this regard. The Law Reform Commission has since published an Issue Paper¹²⁹⁵ in this regard, calling for comments by 31 August 2019.

5.3 Life partners/cohabitants

5.3.1 General

The terms “life partners” and “cohabitants” refer to couples who live together without having entered into a legally valid marriage. Hahlo¹²⁹⁶ refers to “the relationship of a man and a woman who live together ostensibly as man and wife, without having gone through a legal ceremony of marriage”. “Life partners” or “cohabitants” could, however, also refer to couples who live together after having entered into a “marriage” that is not regarded as valid in our law. For purposes of this part of the chapter, any reference to “life partners” is limited to couples who live together without having entered into a marriage,¹²⁹⁷ civil union or religious marriage, and the relationship of such couples will be referred to as a life partnership.

¹²⁹³ South African Law Reform Commission *Thirty fifth annual report 2007/2008* 30.

¹²⁹⁴ At par 26.

¹²⁹⁵ *Issue Paper 35 Single Marriage Statute* Project 144 Pretoria, 2019.

¹²⁹⁶ *The South African law of husband and wife* (1985) 36.

¹²⁹⁷ In terms of the Marriage Act, CUA or RCMA.

A life partnership can exist between heterosexual or same-sex partners and has some of the characteristics of a marriage.¹²⁹⁸ As mentioned, prior to 1994, South African law recognised only civil marriages solemnised in terms of the Marriage Act between two persons of the opposite sex, as valid marriages.¹²⁹⁹ Other “marriages” were not recognised and life partnerships even less so. A statement made as far back as 1984 by Thomas¹³⁰⁰ summed up the position – he said that South African family law for all intents and purposes chose largely to ignore relationships outside of civil marriage, with hardly any provision to regulate them either during their subsistence or after their termination.¹³⁰¹ The advent of the Bill of Rights, however, changed this – not because the Bill of Rights provides for a fundamental right to marry, but because the other rights contained therein, such as the right to human dignity, equality, freedom of religion, belief and opinion, provide a strong drive to move away from the traditional view that focused only on marriages as described above.¹³⁰² In *Dawood*¹³⁰³ the Constitutional Court emphasised¹³⁰⁴ that the right to human dignity encompasses and protects an individual’s right to have permanent intimate relationships, which means that the right to family life is protected by the right to dignity.

5.3.2 Legal consequences of life partnerships

The general rule in our law has traditionally been that a life partnership does not give rise to any particular legal consequences¹³⁰⁵ and this is borne out by the fact that, to date, there is still no comprehensive legislation pertaining to life partnerships in our

¹²⁹⁸ Botha *et al* 70; Heaton & Kruger 255.

¹²⁹⁹ See 5.1 above.

¹³⁰⁰ “Konkubinaat” 1984(47)4 *THRHR* 455.

¹³⁰¹ At 456.

¹³⁰² Skelton & Carnelley (eds) 206; Du Toit 2009(126)3 *SALJ* 487; Smith “The development of South African matrimonial law with specific reference to the need for and application of a domestic partnership rubric?” Unpublished LLD thesis, University of the Free State (2009) 192.

¹³⁰³ 2000 (3) SA 936 (CC).

¹³⁰⁴ At par 36.

¹³⁰⁵ *Butters v Mncora* 2012 (4) SA 1 (SCA) par 11; Sinclair & Heaton 274; Skelton & Carnelley (eds) 208; Smith in Heaton (ed) 395; Smith “Unmarried same-sex couples more favourable legal position than heterosexual counterparts” 2016(565) *De Rebus* 37.

law.¹³⁰⁶ Our courts have on occasion referred¹³⁰⁷ to the current legal position relating to life partnerships as “a patchwork of laws that does not express a coherent set of family law rules”. Life partners therefore traditionally had to self-regulate the legal consequences of their relationship by using the following ordinary legal rules and remedies of private law to achieve some measure of protection:¹³⁰⁸

a. Law of contract

Partners can use a contract to achieve some measure of protection against each other and third parties. The terms of the contract determine each partner’s rights and duties.¹³⁰⁹ If the relationship ends and the parties cannot agree on how jointly owned assets should be divided, either of them may institute the *actio communi dividundo*, which means the court will order a division it deems fair, or appoint a receiver or liquidator to divide the assets.¹³¹⁰ It goes without saying that contract law is hardly adequate to deliver justice in family relationships that are often quite complex.¹³¹¹ The basic premise of contract law is that parties negotiate and contract on an equal footing. As pointed out by Heaton,¹³¹² the suggestion that partners have choice when negotiating domestic and family issues ignores the context and reality of South African culture. In many cultures, women are not in a position to insist on contracts that adequately regulate their intimate relationships or the patrimonial consequences at the breakdown of the relationship. They cannot therefore rely on contract law to give them the required protection.

¹³⁰⁶ Smith in Heaton (ed) 395; Clark “Families and domestic partnerships” 2002(119)3 *SALJ* 637.

¹³⁰⁷ *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae; Lesbian and Gay Equality Project v Minister of Home Affairs)* 2006 (1) SA 524 (CC) par 125.

¹³⁰⁸ Heaton & Kruger 255; Sinclair & Heaton 274; Skelton & Carnelley (eds) 206; Heaton “An overview of the current legal position regarding heterosexual life partnerships” 2005(68)4 *THRHR* 665; Smith 2016(565) *De Rebus* 37.

¹³⁰⁹ Heaton & Kruger 257.

¹³¹⁰ Heaton & Kruger 257.

¹³¹¹ Bonthuys “Family contracts” 2004(121)4 *SALJ* 879.

¹³¹² “Striving for gender equality in family law: selected issues” 2005(21)4 *SAJHR* 552.

b. Life partnership agreement

This is commonly known as a domestic partnership agreement or life partnership agreement. For purposes of this thesis, I will refer to “life partnership agreement” to avoid any confusion with the agreements envisaged in the Domestic Partnership Bill.¹³¹³ Such an agreement can be used by life partners to regulate the rights and duties against each other, for example maintenance during the relationship, post-relationship maintenance, ownership of property owned before the relationship started and ownership of property acquired during the relationship.¹³¹⁴ There was previously some uncertainty whether such an agreement is enforceable because it could be regarded as *contra bonos mores*, but in view of the increasing recognition of life partnerships, this is clearly an outdated argument.¹³¹⁵ The general rule in our law is that the contract is only binding between the partners,¹³¹⁶ but where the parties agreed to maintain each other (or one party to maintain the other), and the party who is liable for the support is killed by a third party, the common law action for damages for loss of support is available to the surviving partner.¹³¹⁷ Although our law provides for life partnership agreements, a contractually valid life partnership agreement may still on the death of one of the parties be found to be an invalid and unenforceable *pactum successorium*.¹³¹⁸ The latter is an agreement in terms of which the parties regulate the devolution of their estates after the death of either or both of them.¹³¹⁹ South African law does not recognise *pacta successoria* or contracts in which the parties try to regulate the devolution of an estate, unless such contracts are contained in an antenuptial contract.¹³²⁰ A detailed discussion of *pacta successoria* falls outside the scope of this thesis, but I would suggest that the possibility of an unenforceable agreement, together with the criticism levelled

¹³¹³ See 5.3.4 for a discussion of this Bill.

¹³¹⁴ Heaton & Kruger 259.

¹³¹⁵ *Ally v Dinath* 1984 (2) SA 451 (T); Heaton & Kruger 260; Heaton 2005(68)4 *THRHR* 666.

¹³¹⁶ Heaton & Kruger 259.

¹³¹⁷ *Paixão v Road Accident Fund* 2012 (6) SA 377 (SCA).

¹³¹⁸ Schwellnus “The legal position of cohabitees in the South African law” 1995(16) *Obiter* 151.

¹³¹⁹ *McAlpine v McAlpine* 1997 (1) SA 736 (A).

¹³²⁰ Jamneck “Exclusion of liability in wills” 2013(38)2 *Journal for Juridical Sciences* 11 fn 58.

above in relation to contracts, make this an equally unreliable mode of protection for life partners.

c. Universal partnership

Life partners can enter into an agreement in terms of which they determine each party's share of, and contribution to, the partnership.¹³²¹ As an agreement is involved, the normal rules of contract apply, for example the parties must have capacity to contract and have the intention of entering into an agreement.¹³²² On termination of the relationship, the partnership terminates and the rules that apply to partnerships will apply unless the parties have agreed differently. In the absence of an agreement, partnership assets will therefore be divided according to the respective contributions by the parties. If it is not possible to prove the contributions, the assets will be divided equally.¹³²³ If, however, parties agreed on the proportion in which they will hold the assets during the existence of the partnership, the assets will on dissolution be divided accordingly.¹³²⁴ While such an agreement does provide protection for the parties, it will only be a real mode of protection if the parties contract on equal footing.

d. Wills

Wills can be used for partners to nominate each other as the heir to their respective estates. A will is, however, a voluntary, unilateral expression of a person's wishes, and it cannot be relied on by the other partner in a relationship as a measure for protection, as it may be amended at any time without the other partner's cooperation, consent or even knowledge.

¹³²¹ *V (also known as L) v De Wet* 1953 (1) SA 613 (O); *Ally v Dinath* 1984 (2) S 451 (T); *Butters v Mncora* 2012 (4) SA 1 (SCA); Heaton 2005(68)4 *THRHR* 665.

¹³²² *Sepheri v Scanlan* 2008 (1) SA 322 (C); Heaton & Kruger 259.

¹³²³ *Isaacs v Isaacs* 1949 (1) SA 952 (C); *V (also known as L) v De Wet* 1953 (1) SA 613 (O).

¹³²⁴ Heaton & Kruger 259; Smith in Heaton (ed) 441.

e. Unjustified enrichment

Unjustified enrichment occurs when one person's estate has been increased at the expense of another person's estate and there is no sufficient legal ground to retain such increase.¹³²⁵ Our law does not yet recognise a general enrichment claim.¹³²⁶ In certain circumstances a person whose partner has been enriched at the expense of that person can institute an enrichment claim, but it seems that this remedy is of limited use to life partners.¹³²⁷

Since the dawn of the new constitutional era in 1994, several Acts have been amended to confer spousal benefits on life partners and several court decisions have extended further benefits to life partners, albeit mainly to same-sex partners.¹³²⁸ Du Toit¹³²⁹ refers to the central theme of these judicial and legislative developments as being the foundational values of equality and human dignity in the Bill of Rights. He also refers to four sub-themes that underlie these developments, namely:

- Extending protection to particularly vulnerable groups in society;
- Ending the historical marginalisation of certain groups in society;
- Legal recognition of relationships other than a civil marriage and the equal treatment of such relationships;
- The need for the law to accommodate the diversity in the South African society.

While the judicial and legislative intervention is welcome, piecemeal extension of rights and duties to life partners is clearly not desirable.¹³³⁰ To expect life partners to rely on contracts and wills to protect themselves could imply that they are responsible for their own protection,¹³³¹ which is in contrast with the view expressed by the Constitutional

¹³²⁵ Eiselen and Pienaar *Unjustified enrichment. A casebook* (2008) 3.

¹³²⁶ Heaton & Kruger 260; Sinclair & Heaton 278; Skelton & Carnelley (eds) 217.

¹³²⁷ South African Law Reform Commission *Report on domestic partnerships* Project 118 Pretoria, 2006 123.

¹³²⁸ Heaton & Kruger 255; Skelton & Carnelley (eds) 209.

¹³²⁹ 2009(126)3 *SALJ* 481-482.

¹³³⁰ Skelton & Carnelley (eds) 209.

¹³³¹ Heaton & Kruger 255.

Court¹³³² that there is a need for legislative reform. This comment by the Constitutional Court echoed an earlier statement in *Dawood*¹³³³ that families come in many shapes and sizes and that care should be taken not to entrench some form of family at the expense of other forms. The court in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹³³⁴ also mentioned¹³³⁵ that marriage is only one form of life partnership.

As mentioned before, life partnerships can operate between same-sex and heterosexual life partners. Our law has not extended the same treatment to these different relationships – as Smith¹³³⁶ points out, the judiciary has approached the development of protection for life partners “on either side of a fault-line drawn by the sexual orientation” of the life partners. It is therefore necessary to analyse the limited legislative and judicial recognition that has been afforded to these relationships separately.

5.3.2.1 Same-sex life partners

5.3.2.1.1 Legislative development

Some Acts afford protection to same-sex life partners. A few examples include:

- The EDA includes in the definition¹³³⁷ of “spouse” a person in a same-sex union which the Commissioner of the South African Revenue Service Act is satisfied is intended to be permanent;
- The Pension Funds Act¹³³⁸ includes a permanent life partner in the definition of “spouse”;¹³³⁹

¹³³² *Volks v Robinson* 2005 (5) BCLR 446 (CC) 526.

¹³³³ 2000 (3) SA 936 (CC) pars 31-32.

¹³³⁴ 2000 (2) SA 1 (CC).

¹³³⁵ At par 36.

¹³³⁶ “Intestate succession and surviving heterosexual life partners: Using the jurist’s ‘laboratory’ to resolve the ostensible impasse that exists after *Volks v Robinson*” 2016(133)2 *SALJ* 288.

¹³³⁷ Section 1.

¹³³⁸ 24 of 1956.

¹³³⁹ Section 1.

- The ITA includes in the definition¹³⁴⁰ of “spouse” a partner in a same-sex union intended to be permanent.¹³⁴¹

5.3.2.1.2 Judicial development

The lack of complete legislative protection of same-sex relationships inevitably led to constitutional attack in light of the provisions of the interim Constitution (Act 200 of 1993) regarding the right to equal protection of the law in section 8(1) and the prohibition of discrimination based on sexual orientation in terms of section 8(2). Since the advent of the Bill of Rights (as contained in chapter 2 of the “final” Constitution enacted on 4 February 1997) there have been several court cases in which the legal position has been challenged.

Although *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹³⁴² does not pertain to maintenance, it is important in the context of this thesis as it was the first case to provide a platform for same-sex couples to approach the courts for an order declaring statutory provisions and common law rules as unfair discrimination against them.¹³⁴³ The court held¹³⁴⁴ that withholding the benefits of the (now repealed) Aliens Control Act¹³⁴⁵ applicable to the “spouse” of a South African resident from same-sex life partners unfairly discriminated against them, as it violated their constitutional rights to dignity and equality.

¹³⁴⁰ Section 1.

¹³⁴¹ This definition has operated since 8 January 2016. Prior to this date the definition referred to a partner in a same-sex union that the Commissioner of the South African Revenue Service was satisfied was permanent.

¹³⁴² 2000 (2) SA 1 (CC).

¹³⁴³ De Vos & Barnard “Same-sex marriage, civil unions and domestic partnerships in South Africa: critical reflections on an ongoing saga” 2007(124)4 *SALJ* 824; Smith 2016(133)2 *SALJ* 291.

¹³⁴⁴ At par 97.

¹³⁴⁵ 96 of 1991.

In *Du Plessis v Road Accident Fund*¹³⁴⁶ the court extended the common law action for damages for loss of support to a surviving same-sex life partner whose deceased same-sex life partner had undertaken to maintain him.

In *Ripoll-Dausa v Middleton*¹³⁴⁷ the applicant asked the court to declare the omission from section 1(a) and (d) of the ISA¹³⁴⁸ of the phrase “or a member of a permanent same-sex life partnership” inconsistent with the Constitution and invalid, and to read that phrase into the relevant sections. He also asked the court to declare the definition of “survivor” in section 1 of the MSSA inconsistent with the Constitution and invalid and to declare that the definition should be read as including “or the surviving partner in a permanent same-sex life partnership dissolved by death”. He also requested a declaration that the omission from sections 2(1), 2(3)(b), 2(3)(d), 3(a) and 3(c) of the MSSA of the words “or a member of a permanent same-sex life partnership” was inconsistent with the Constitution and invalid and that those sections should be read as if the stated words appeared in them. He claimed to have been in a same-sex life partnership with his deceased partner. The respondent, however, contended that the applicant and the deceased had not been same-sex life partners. The court postponed the application for the hearing of oral evidence regarding the dispute of fact as to whether the applicant had indeed been in a same-sex life partnership. The applicant submitted that this issue should stand over for later determination and asked the court to proceed to rule on the allegation of unconstitutionality of the Acts referred to. The court, however, held that it could not decide the allegation of unconstitutionality without reference to the factual dispute. It accordingly postponed the application to a later date for the hearing of oral evidence so that the issue of whether the applicant and the deceased had indeed been same-sex partners in a permanent life partnership could be resolved. It is not clear whether or not such a hearing ever occurred, as no further reference to the case is to be found in reported or unreported case law.

¹³⁴⁶ 2004 (1) SA 359 (SCA).

¹³⁴⁷ 2005 (3) SA 141 (C).

¹³⁴⁸ 81 of 1987.

In *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*¹³⁴⁹ (“*Fourie*”) two lesbian women asked the Constitutional Court for an order that the law recognise their right to marry, and an order that the Minister of Home Affairs and the Director General register their marriage in terms of the Marriage Act. Although this case did not deal with maintenance, it is relevant to this discussion as it led to important legislative development. This case was the culmination of a long judicial route followed by the applicants through the (then) Transvaal Provincial Division and the Supreme Court of Appeal (then Appellate Division).¹³⁵⁰ The majority judgment held¹³⁵¹ that the failure of the common law and Marriage Act to provide the means for same-sex couples to enjoy the same status, entitlement and responsibilities given to heterosexual couples through marriage, was an unjustifiable violation of their constitutional rights in section 9(1) and 9(3) of the Constitution to equal protection of the law and to not be discriminated against unfairly. This failure is also an unjustifiable violation of their right to dignity as provided for in section 10 of the Constitution.¹³⁵² The majority held¹³⁵³ that the common law definition of marriage was inconsistent with the Constitution and therefore invalid. It suspended this declaration of invalidity for twelve months to allow Parliament to correct the defect. If Parliament failed to do so, the words “or spouse” would automatically be read into section 30(1) of the Marriage Act.¹³⁵⁴ The Minister of Home Affairs and Director General were ordered to pay the costs of the respondents in the High Court, Supreme Court of Appeal and Constitutional Court. The minority judgment by O’Regan J agreed¹³⁵⁵ with the main order, but not with the suspension. She held¹³⁵⁶ that the order should have immediate prospective effect as this would protect the constitutional rights of same-sex partners without precluding Parliament from finding a solution.

¹³⁴⁹ 2006 (1) SA 524 (CC).

¹³⁵⁰ *Fourie v Minister of Home Affairs* [2005] 1 All SA 273 (SCA).

¹³⁵¹ At 398.

¹³⁵² At 399.

¹³⁵³ At 415.

¹³⁵⁴ At 414.

¹³⁵⁵ At 415.

¹³⁵⁶ At 419.

The legislature responded by promulgating the CUA on 30 November 2006. This Act applies to same-sex and heterosexual couples and, broadly speaking, confers the consequences of a civil marriage on a civil union.¹³⁵⁷

Before the coming into operation of the CUA, the Pretoria High Court in *Gory v Kolver*¹³⁵⁸ was asked to consider the constitutionality of section 1(1) of the ISA. The applicant, Mr Gory, was the surviving partner of a same-sex life partnership. His partner, Mr Brooks, had died intestate and the executor of Mr Brooks' estate regarded his parents as his intestate heirs. Mr Gory challenged this and claimed that he was the sole intestate heir of the estate due to his relationship with the deceased. The High Court found that Mr Gory and the deceased had indeed been in a permanent same-sex life partnership and had undertaken reciprocal duties of support. It declared the omission in section 1(1) of the ISA of the words "or partner in a permanent same-sex life partnership in which the parties have undertaken reciprocal duties of support" inconsistent with the Constitution as it unfairly discriminated on the basis of sexual orientation by not affording same-sex relationships the same protection as heterosexual marriages.¹³⁵⁹ It made an order that those words had to be read into the specific section. The court also made an order that the order of unconstitutionality and reading-in would have no effect on any acts performed in respect of the administration of any intestate estate which had formally been wound up by the time the order was granted.

The matter was referred to the Constitutional Court¹³⁶⁰ ("*Gory*") for the order of unconstitutionality to be confirmed. An appeal to intervene in the matter was made by a certain Ms Starke and her three sisters. Their late brother was alleged to have been in a permanent same-sex life partnership at the time of his death and his alleged partner claimed that he was the sole intestate heir of the deceased estate. The sisters disputed

¹³⁵⁷ See 1.2.5.

¹³⁵⁸ [2006] 2 All SA 640 (T).

¹³⁵⁹ At 648.

¹³⁶⁰ *Gory v Kolver* 2007 (3) BCLR 249 (CC).

the permanency of the relationship and claimed that they were the intestate heirs. They accordingly asked the court for leave to intervene on the basis that they would be prejudiced should the High Court order in *Gory v Kolver* be confirmed, as they would be deprived of their vested rights as intestate heirs of their late brother's estate. They suggested that reading-in was not the appropriate remedy and that whatever order the court made, should apply only to intestate estates of persons who die after the order was made. The court agreed that they had a direct and substantial interest in the application as their rights as intestate heirs would cease if the High Court order in *Gory v Kolver* was confirmed.

Turning to the constitutionality of section 1(1) of the ISA, the court held¹³⁶¹ that the section conferred intestate succession rights on surviving heterosexual spouses but denied those rights to same-sex life partners who were (at the time) prohibited from legally marrying. This amounted to a violation of the equality clause¹³⁶² in the Constitution as it discriminated on the grounds of sexual orientation. In terms of section 9(5) of the Constitution, such discrimination is presumed to be unfair, unless the contrary is established. The court could find no justification for any limitation of Mr Gory's right to equality and dignity¹³⁶³ and accordingly confirmed¹³⁶⁴ the High Court finding that section 1(1) of the ISA was unconstitutional and invalid.

It then considered what the appropriate remedy should be. After considering the submissions by all parties, it held¹³⁶⁵ that it was the task of the legislature to enact legislation which effectively deals with all aspects of the different types of marital and non-marital domestic partnerships. The primary responsibility of the Constitutional Court was to cure "the existing and historical" unconstitutionality of section 1(1) of the

¹³⁶¹ At 258.

¹³⁶² Section 9(3).

¹³⁶³ At 259.

¹³⁶⁴ At 259.

¹³⁶⁵ At 263.

ISA, and this required a reading-in order.¹³⁶⁶ It accordingly confirmed¹³⁶⁷ the reading-in order granted by the High Court. The court held¹³⁶⁸ specifically that the piecemeal protection that had been conferred on same-sex partners would continue to apply until the legislature expressly intervened.

As far as the question of retroactivity raised by the Starke sisters was concerned, the court mentioned¹³⁶⁹ that this was the first case that dealt with the recognition of entitlements of permanent same-sex life partners in which the effect was to deprive third parties of vested claims. The court explained¹³⁷⁰ that section 2 of the Constitution (the so-called “supremacy clause”) provides that the Constitution is the supreme law of the Republic and all law or conduct inconsistent with it is invalid. A consequence of section 2(1) is that all legislation already in existence when the Constitution took effect would continue in force until it was amended or repealed, but only to the extent that it was consistent with the Constitution. This means that a pre-existing law or provision of a law which was unconstitutional became invalid the moment the Constitution came into effect.¹³⁷¹ If a court therefore, after the introduction of the Constitution, made an order of unconstitutionality, it simply declared invalid what was already invalidated by the Constitution. An unconstitutional law could therefore be invalidated by the Interim Constitution with effect from 27 April 1994, even though the applicant’s course of action only arose after the 1996 Constitution came into effect on 4 February 1997.¹³⁷² In terms of section 172(1)(a) of the Constitution, a court considering a constitutional matter “must” declare a law or conduct that is inconsistent with the Constitution invalid to the extent of its unconstitutionality. The court “may”, however, in terms of section 172(1)(b)(i) limit the retroactive effect of its declaration if the interests of justice and

¹³⁶⁶ At 263.

¹³⁶⁷ At 263.

¹³⁶⁸ At 262.

¹³⁶⁹ At 265.

¹³⁷⁰ At 266.

¹³⁷¹ At 266.

¹³⁷² At 266.

equity require this.¹³⁷³ The court held¹³⁷⁴ that it would not be just and equitable to deny Mr Gory constitutional relief by making its order of invalidity of section 1(1) prospective, despite the fact that the declaration would impact on the interests of third parties such as Mr Brooks' parents. The court, however, did not agree¹³⁷⁵ with the way in which the High Court had framed the order of retroactivity as it felt that it went too far. It accordingly held¹³⁷⁶ that the order of unconstitutionality and reading-in "will not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application". It also held that if "serious administrative or practical problems"¹³⁷⁷ are experienced, any interested person may approach the court for a variation of the order.

As Picarra¹³⁷⁸ points out, the court's confirmation is not surprising in light of its earlier decisions.¹³⁷⁹ It is, however, interesting as the contextual landscape in which the ruling was made was very different from that which operated when the other decisions were made – at the time of the other decisions, same-sex life partners were unable to marry legally, but *Gory* was heard after the ruling in *Fourie*, which imposed a duty on Parliament to remedy the defects in the Marriage Act and the common law which precluded same-sex couples from marrying, by 1 December 2006. As the ruling in *Fourie* provided that the words "or spouse" would be read into section 30(1) of the Marriage Act after the words "or husband", failing legislative intervention, Picarra suggests this meant that within a few weeks from the *Gory* decision on 23 November 2006, same-sex couples would be able to "marry", either because of legislation allowing it or as a result

¹³⁷³ At 267.

¹³⁷⁴ At 267.

¹³⁷⁵ At 267.

¹³⁷⁶ At 277.

¹³⁷⁷ At 277.

¹³⁷⁸ "*Gory v Kolver* NO 2007 (4) SA 97 (CC)" 2007(23)3 *SAJHR* 564.

¹³⁷⁹ See the cases discussed above.

of the reading-in order. They would therefore be entitled to the same succession rights relating to intestacy as surviving married partners, should they choose to marry.

Wood-Bodley¹³⁸⁰ is also of the opinion that the ruling is unsurprising. He agrees¹³⁸¹ with the court's finding that the declaration of invalidity would not apply to a completed transfer of property to an heir who was not aware that the constitutional validity of section 1(1) was being challenged. He does, however, comment¹³⁸² that the suggestion that any interested person who experiences serious administrative or practical problems could approach the court for a variation of the order, raises questions about the progress the surviving partner must have made in asserting his or her claim to inherit in order to be protected.

It is interesting to note that the court in *Gory* ordered¹³⁸³ the Minister of Justice, who was one of the respondents, to pay the costs of Mr Gory and the executor. The court voiced its dissatisfaction at the failure of the state to enact "comprehensive legislation" that accommodated same-sex partnerships in a constitutionally acceptable manner, which failure compelled Mr Gory to bring the application. The court indeed held¹³⁸⁴ that the state has an ongoing constitutional obligation to "respect, protect, provide and fulfil the rights in the Bill of Rights" by amending or replacing legislation that violates constitutional rights and that justice and equity require that the Minister should pay the costs.¹³⁸⁵

*Duplan v Loubser*¹³⁸⁶ was decided after the coming into operation of the CUA. In this case, the applicant sought an order declaring that he was entitled to inherit from his

¹³⁸⁰ "Intestate succession and gay and lesbian couples" 2008(125)1 SALJ 48.

¹³⁸¹ 2008(125)1 SALJ 51.

¹³⁸² 2008(125)1 SALJ 51.

¹³⁸³ At 277.

¹³⁸⁴ At 276.

¹³⁸⁵ At 176. See also Wood-Bodley 2008(125)1 SALJ 51.

¹³⁸⁶ Unreported, case number 24589/2015 [2015] ZAGPPHC 849, judgment delivered on 23 November 2015.

deceased partner's intestate estate. The deceased died without descendants or adopted children or parents. The respondent was the only surviving sibling of the deceased and accordingly stood to inherit the entire deceased estate in terms of the provisions of the ISA. The parties had been in a same-sex life partnership for twelve years and had undertaken reciprocal duties of support. They had not solemnised or registered their partnership in terms of the CUA. The applicant relied on the judgment in *Gory* and submitted that he was the spouse of the deceased and therefore entitled to inherit, despite not having solemnised and registered the relationship as a civil union. The executor maintained that only a spouse in a marriage or partnership solemnised and registered as a civil union is entitled to inherit. As the applicant was not such a spouse, he could not inherit. The court explained¹³⁸⁷ that our common and statutory law before, and in some instances after, the Constitution distinguished between married and unmarried people by extending certain benefits to married people but not to unmarried people. The purpose of the CUA is to give same-sex partners the choice to enter into a formal relationship recognised by law, which enjoys the same status, privileges and responsibilities enjoyed by heterosexual couples who enter into marriage. The Act does not, however, materially alter the distinction between married and unmarried people.¹³⁸⁸ It also does not alter the position of heterosexual couples who choose not to solemnise and register their relationship.¹³⁸⁹ The court considered the judgment in *Gory* and suggested¹³⁹⁰ that it was aimed at protecting same-sex life partners who had undertaken reciprocal duties of support, as there was no legislation recognising same-sex marriages at the time of the judgment. The CUA had however changed that position and same-sex civil unions are now recognised as equivalent to heterosexual marriages.¹³⁹¹ This recognition however only applies to marriages and civil partnerships which are solemnised and registered under the CUA. The court held¹³⁹² that the order in

¹³⁸⁷ At par 9.

¹³⁸⁸ At par 9.

¹³⁸⁹ At par 10.

¹³⁹⁰ At par 13.

¹³⁹¹ At par 14.

¹³⁹² At par 18.

Gory was intended to include same-sex life partners who undertook reciprocal duties of support until section 1(1) of the ISA was amended to exclude them from the ambit of this Act. Parliament removed the impediment on same-sex marriages by introducing the CUA – this cured the unconstitutionality relating to same-sex marriages, but not of section 1(1) of the ISA. The reading-in order had therefore not run its course, as section 1(1) has not yet been amended.¹³⁹³ The court noted¹³⁹⁴ that the *stare decisis* doctrine precluded it from deviating from the reading-in order of the words as decided in *Gory*. This doctrine requires lower courts to follow the decisions of higher courts in the judicial hierarchy in order to ensure “predictability, reliability, uniformity, equality, certainty and convenience”.¹³⁹⁵ The court noted¹³⁹⁶ that a deviation from a higher court’s decision is possible in instances where a provision that has been declared unconstitutional is subsequently amended by the legislature and the amendment leads to a material change. This is, however, only possible if the amendment to the statute or the new statute that is implemented to remove the constitutional complaint is not open to attack.¹³⁹⁷ The court accordingly held¹³⁹⁸ that the reading-in order in *Gory* still applied and declared the applicant the only intestate heir of the deceased.

The brother of the deceased applied directly to the Constitutional Court for leave to appeal.¹³⁹⁹ He argued that the High Court had incorrectly confined itself to the *stare decisis* principle and had failed to appreciate the power the legislature has to amend the law and substitute decisions of the Constitutional Court. He further submitted that the decision in *Gory* was an interim measure designed to apply only until the underlying mischief was resolved by Parliament. According to his contention, the mischief to be addressed was the inability of permanent same-sex partners to enter into a legally

¹³⁹³ At par 19.

¹³⁹⁴ At par 20.

¹³⁹⁵ *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 CC at par 54.

¹³⁹⁶ At par 21.

¹³⁹⁷ This was also pointed out in *Gory v Kolver* at par 30.

¹³⁹⁸ At par 25.

¹³⁹⁹ *Laubscher v Duplan* 2017 (2) SA 264 (CC). The High Court case refers to the deceased and his brother as “Loubser” whereas the Constitutional Court case refers to them as “Laubscher”. No explanation is given for the difference in spelling.

recognised union, and he submitted that section 13(2)(b) of the CUA addresses this mischief, as its effect is that same-sex partners who enter into a civil union under the Act are automatically included as “spouses” in the definition in section 1(1) of the ISA.¹⁴⁰⁰ As the mischief had been addressed, it followed that the CUA repealed the order in *Gory*. He also suggested that the interpretational maxim *cessante ratione legis cessat ipsa lex* (once the reason for a law falls away, the law itself ceases to exist) implied that section 13(2)(b) had replaced the law created by the reading-in order.

The respondent rejected the contention of the applicant. He contended that the *Gory* order was not intended as an interim measure and that it would apply until Parliament repealed or amended it. He disagreed with the reliance on the *cessante ratione legis cessat ipsa lex* principle as he contended that the purpose of *Gory* was to enable surviving same-sex partners to inherit from each other despite the fact that they were not “married”. This purpose had not fallen away as the CUA only extended protection to partners who have entered into a civil union.

The Commission for Gender Equality joined the case as *Amicus Curiae* (friend of the court). They contended that there were no sound policy reasons to undo the protection that *Gory* provided, specifically as, after more than a decade since the judgment, the legislature had yet to amend the wording of section 1(1) of the ISA to bring it in line with the decision in *Gory*. They submitted that the order in *Gory* better gives effect to “the spirit, purport and objects of the Bill of Rights” because it clearly indicates that the Constitutional Court does not prefer one type of family relationship over another.

The Constitutional Court (“*Duplan*”) granted¹⁴⁰¹ the applicant leave to appeal directly to that court and proceeded to consider the following aspects:

- a. Whether the reading-in order in *Gory* was meant as an interim measure;

¹⁴⁰⁰ This section provides that any reference in an Act (other than the Marriage Act and the Customary Marriages Act) to husband, wife or spouse includes a civil union partner.

¹⁴⁰¹ At par 18.

- b. The interplay between the order in *Gory* and the CUA;
- c. Whether the principles stemming from *Volks v Robinson*¹⁴⁰² (“*Volks*”) were applicable to the matter.

All the judges concurred in the outcome, but two different judgments were given. Mbha AJ, who delivered the judgment of the majority, explained the different judgments by noting¹⁴⁰³ that cases similar to this one often gave rise to viable interpretative differences and this case was no exception.

Mbha AJ disagreed¹⁴⁰⁴ with the applicant’s contention that the order in *Gory* had fallen away with the enactment of the CUA. He referred to the statement made in *Gory*¹⁴⁰⁵ that, once legislation enabling same-sex couples to enter into a civil union with the same consequences as a marriage, was enacted “there would [then] appear to be no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession”. The court in *Gory* nevertheless chose to use the remedy of reading-in, leading to the assumption that it acknowledged that the pending legislation would not necessarily amend section 1(1) of the ISA.¹⁴⁰⁶ The court in *Gory* furthermore stated¹⁴⁰⁷ that the reading-in order would be of indefinite duration, but subject to amendment or repeal by Parliament. Mbha AJ considered¹⁴⁰⁸ the meaning of “interim”, which is defined¹⁴⁰⁹ as “[i]n the meantime; meanwhile; temporary; between”, and suggested¹⁴¹⁰ that there was no indication that “interim” refers to a shorter, rather than a longer, period. The judge further held¹⁴¹¹ that the non-amendment of section 1(1) of the ISA did not change the interim nature of the order

¹⁴⁰² 2005 (5) BCLR 446 (CC).

¹⁴⁰³ At par 20.

¹⁴⁰⁴ At par 22.

¹⁴⁰⁵ At 262.

¹⁴⁰⁶ At 23.

¹⁴⁰⁷ At 262.

¹⁴⁰⁸ At par 24.

¹⁴⁰⁹ *Black’s law dictionary* 6 ed at 562.

¹⁴¹⁰ At par 24.

¹⁴¹¹ At par 24.

and the order in *Gory* accordingly remained in place until the legislature chose to amend it.

Mbha AJ considered¹⁴¹² two different approaches in dealing with the interplay between *Gory* and the CUA. The interpretative approach requires interpreting section 1(1) of the ISA as amended by *Gory* and assessing whether the CUA had specifically amended this section. The judge held¹⁴¹³ that this was not the case and that there was no reason why the CUA and the position created by *Gory* could not co-exist. The contextual approach requires assessing whether the CUA addressed the mischief that the reading-in order in *Gory* aimed to address. The judge referred¹⁴¹⁴ to the statement¹⁴¹⁵ in *Gory* that if Parliament either failed to implement legislation before the deadline set in *Fourie* or if it did enact legislation giving same-sex couples the same status, benefits and responsibilities as heterosexual couples, the effect of a reading-in order would be that section 1(1) of the ISA would apply to all spouses who “marry”, and also to permanent same-sex life partners who have undertaken reciprocal duties of support but who fail to “marry” under the new dispensation. According to Mbha AJ,¹⁴¹⁶ this led to the conclusion that, as the CUA did give same-sex couples who enter into “marriage” the same status and benefits as opposite sex couples, a specific amendment of section 1(1) of the ISA was still required to remove the reading-in order. The CUA therefore did not cure the mischief that the reading-in order aimed to cure.¹⁴¹⁷ The effect of *Gory* was to include all permanent same-sex partners in the ambit of section 1(1), whereas the CUA brought only registered civil union partners into the ambit of section 1(1).¹⁴¹⁸ The judge agreed¹⁴¹⁹ with the respondent’s submission that the applicant’s reliance on the *cessante ratione legis cessat ipsa lex* principle was ill-founded as the mischief

¹⁴¹² At par 25.

¹⁴¹³ At par 39.

¹⁴¹⁴ At par 28.

¹⁴¹⁵ At 262.

¹⁴¹⁶ At par 29.

¹⁴¹⁷ At par 30.

¹⁴¹⁸ At par 33.

¹⁴¹⁹ At par 36.

contemplated by the order in *Fourie* was the inability of same-sex partners to marry, whereas the mischief in *Gory* was the inability of same-sex partners to inherit on intestacy. The reading-in order in *Gory* therefore did not fall away when the CUA was enacted.¹⁴²⁰ Froneman J, who delivered the concurring judgment, was of the opinion¹⁴²¹ that the mischief *Gory* was asked to remedy was the inability of same-sex life partners to enter into a legally valid marriage. His view is based on the statement¹⁴²² in *Gory* that the inability of same-sex life partners to marry amounts to discrimination on the listed ground of sexual orientation. According to his judgment, as this inability had been removed by the CUA, it followed that the mischief had been addressed.¹⁴²³

Both judgments considered the principles stemming from the decision in *Volks*. Mbha AJ held¹⁴²⁴ that *Volks* dealt with the right of a permanent life partner to claim maintenance from a deceased estate in terms of the MSSA, and could therefore be distinguished from the *Duplan* matter as the latter deals with the right to benefit on intestacy in terms of section 1(1) of the ISA. Maintenance and intestate succession are very different systems aimed at addressing different needs and therefore require different considerations.¹⁴²⁵ The cases could therefore be distinguished both on the facts and the legal mechanisms used to consider the matter and the court was therefore not obliged to follow the decision in *Volks*.¹⁴²⁶ Mbha AJ specifically stated¹⁴²⁷ that *Volks* “continues to apply with full precedential force within the context of maintenance of surviving spouses”. Froneman J disagreed¹⁴²⁸ with the emphasis placed on the difference between maintenance and intestate succession and suggested¹⁴²⁹ that it does not make sense to

¹⁴²⁰ At par 36.

¹⁴²¹ At par 59.

¹⁴²² At 258.

¹⁴²³ At par 59.

¹⁴²⁴ At par 46.

¹⁴²⁵ At par 48.

¹⁴²⁶ At par 50.

¹⁴²⁷ At par 50.

¹⁴²⁸ At par 74.

¹⁴²⁹ At par 77.

suggest that the “choice” principle referred to in *Volks*¹⁴³⁰ should apply in the context of maintenance but not in the context of intestate succession. He nevertheless agreed¹⁴³¹ that the court was not obliged to follow the decision in *Volks* as it does not adequately reflect the present social context by its apparent moral preference for marriage.¹⁴³² As it is an established principle that a previous decision of the Constitutional Court can be departed from if the decision was clearly wrong, the creation in *Volks* of another form of unfair discrimination meant that the court in *Duplan* could depart from the decision.¹⁴³³

Both judgments concluded¹⁴³⁴ that unmarried same-sex partners who had undertaken reciprocal duties of support were entitled to protection. The majority held¹⁴³⁵ that such partners constituted a new category of beneficiary for purpose of section 1(1) of the ISA and they would continue to enjoy the protection given to them in terms of *Gory*, at least until the legislature specifically amended section 1(1) of the ISA. Froneman J opted¹⁴³⁶ to interpret section 13(2)(b) of the CUA in a way that least infringes the fundamental right to equality in the Bill of Rights and suggested that unmarried same-sex and heterosexual partners who had undertaken reciprocal duties of support were not excluded on a literal reading of the section and therefore “remain entitled to inherit from the intestate estate” of the deceased partner. I fail to understand the reference to heterosexual life partners, as they did not prior to this judgment have the right to intestate succession – for that matter, they still do not have that right. I have to assume that this is an error and that the judge meant to refer to same-sex partners only.

¹⁴³⁰ See 5.3.2.2.2. The “choice principle” essentially refers to the principle applied by the court that parties who had the legal option to get married and chose not to do so, could not claim benefits that were extended to a married couple.

¹⁴³¹ At par 84.

¹⁴³² At par 82.

¹⁴³³ At par 86.

¹⁴³⁴ At pars 70 and 87.

¹⁴³⁵ At par 55.

¹⁴³⁶ At par 87.

Heaton and Kruger¹⁴³⁷ point out that the Constitutional Court in *Gory*, knowing that the right of same-sex partners to marry was imminent, indicated that the commencement of such legislation would not alter the rights and benefits that the Constitutional Court had already extended to same-sex life partners in the decisions that preceded the legislation. That means that same-sex couples who did not enter into a civil union would still be able to claim the protection enjoyed in terms of legislation and judgments before the CUA came into operation and, based on this, it would appear that the decision in *Duplan* is correct.¹⁴³⁸

There is no court case dealing specifically with the MSSA in relation to same-sex life partners. The question arises whether the protection extended to them by *Gory* (albeit in relation to intestate succession) will also apply in the context of the MSSA or whether the promulgation of the CUA means that the courts will place same-sex partners who have not entered into a civil union on the same footing as heterosexual life partners who have chosen not to marry. This question is further discussed in 5.3.3 below.

5.3.2.2 Heterosexual life partners

5.3.2.2.1 Legislative development

Although there was traditionally no impediment to heterosexual partners marrying, several Acts have since 1994 expressly extended the same treatment to them as to spouse, for example:

- The Insolvency Act¹⁴³⁹ includes a heterosexual life partner in the definition¹⁴⁴⁰ of “spouse”;
- The Compensation for Occupational Injuries and Diseases Act¹⁴⁴¹ enables someone living with an employee as “wife and husband” and who is wholly or

¹⁴³⁷ *South African family law* 267.

¹⁴³⁸ *South African family law* 267; Skelton & Carnelley (eds) 215.

¹⁴³⁹ 24 of 1936.

¹⁴⁴⁰ Section 2.

¹⁴⁴¹ 130 of 1993.

partially dependent on that employee, to claim compensation as the employee's dependant if the employee is killed in the course of his or her employment;

- The EDA¹⁴⁴² includes in the definition¹⁴⁴³ of "spouse" a person in a heterosexual union which the Commissioner of the South African Revenue Service Act is satisfied is intended to be permanent;
- The Pension Funds Act¹⁴⁴⁴ includes a permanent life partner in the definition¹⁴⁴⁵ of "spouse";
- The ITA includes in the definition¹⁴⁴⁶ of "spouse" a partner in a heterosexual union intended to be permanent;
- The Maintenance Act¹⁴⁴⁷ applies to the legal duty of any person to maintain another person, irrespective of the nature of the relationship that gives rise to the duty of support;¹⁴⁴⁸
- The Medical Schemes Act¹⁴⁴⁹ defines¹⁴⁵⁰ a "dependant" as including a life partner.

5.3.2.2.2 Judicial development

There have been several cases since 1994 dealing with the common law action for damages for loss of support, where the courts have extended this particular remedy to heterosexual life partners. In *Paixão v Road Accident Fund*¹⁴⁵¹ the plaintiff sued the Road Accident Fund for loss of maintenance and support following the death of her partner with whom she had lived. The evidence indicated that the partner had supported her and her children. The court found that she had not established a legally binding agreement that entitled her to support. Her partner therefore had no legal obligation

¹⁴⁴² 45 of 1955.

¹⁴⁴³ Section 1.

¹⁴⁴⁴ 24 of 1956.

¹⁴⁴⁵ Section 1.

¹⁴⁴⁶ Section 1.

¹⁴⁴⁷ 99 of 1998.

¹⁴⁴⁸ Section 2(1).

¹⁴⁴⁹ 131 of 98.

¹⁴⁵⁰ Section 1.

¹⁴⁵¹ [2011] ZAGPJHC 68.

and she accordingly could not claim loss of support and maintenance. The decision was taken on appeal to the Supreme Court of Appeal,¹⁴⁵² which held that a contractual undertaking to support suffices. The court overturned the decision of the court *a quo* and held that there was a tacit agreement which established a reciprocal duty of support worthy of legal protection. The action for damages for loss of support is, however, a very specific remedy, which is not dependent on a legally enforceable duty to support¹⁴⁵³ and this duty of support is not dependent on the existence of a valid marriage.¹⁴⁵⁴ It cannot be regarded as a spousal benefit and this case therefore cannot be seen as a general approach by our courts towards extending spousal benefits to heterosexual life partners.

Despite the limited legislative recognition of heterosexual life partners, our courts have been unwilling to extend spousal benefits to them. To date, only two cases dealing with the issue of heterosexual cohabitation in the context of the MSSA have been reported. In *Robinson v Volks*¹⁴⁵⁵ the applicant had been a partner in a permanent life partnership with a Mr Shandling for about sixteen years. The couple had never married and it was common cause that there was no legal obstacle to a marriage. Following the death of Mr Shandling, Mrs Robinson submitted a claim for maintenance against the deceased estate in terms of the MSSA as she averred that she was not able to provide for her own reasonable maintenance needs. The executor of the estate rejected her claim on the basis that she was not a “survivor” as contemplated by the MSSA. She applied to the court for an order declaring that she was entitled to lodge a claim for maintenance

¹⁴⁵² *Paixão v Road Accident Fund* 2012 (6) SA 377 (SCA).

¹⁴⁵³ See also the discussion of *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* [1999] 4 All SA 421 (A) in 5.2.3.1.

¹⁴⁵⁴ *Santam Bpk v Henery* 1999 (3) 421 (SCA); *Susara Meyer v Road Accident Fund* unreported, case number 22950/2004 North Gauteng High Court, judgment delivered on 28 March 2006; *Sibanda v Road Accident Fund* unreported, case number 9098/07 [2009] ZAGPHC, judgment delivered on 3 February 2009; *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP); Heaton & Kruger 262; Didishe “Legal recognition for non-nuclear families: support for unmarried heterosexual partners” 2012(526) *De Rebus* 26 at 29; Smith & Heaton “Extension of the dependant’s action to heterosexual life partners after *Volks v Robinson* and the coming into operation of the Civil Union Act – thus far and no further?” 2012(75)3 *THRHR* 479; Smith 2016(133)2 *SALJ* 296.

¹⁴⁵⁵ 2004 (6) SA 288 (C).

against the estate, alternatively declaring that the MSSA was unconstitutional and invalid as it did not include a person in a permanent life partnership. The court noted¹⁴⁵⁶ the significant difference between a marriage and a permanent life partnership and referred specifically to the fact that a marriage has legal significance as soon as the marriage ceremony is concluded. In contrast to this, a life partnership has no such immediate legal significance and it is not possible to make a determination of the nature of the relationship at the outset of the relationship. The court referred¹⁴⁵⁷ to Goldblatt¹⁴⁵⁸ who lists¹⁴⁵⁹ the criteria to determine whether a life partnership exists and held that the presence of such criteria can only be established after a lengthy period of time. The court held¹⁴⁶⁰ that, as the criteria did exist in this case, Mrs Robinson had been discriminated against based on her marital status. As the discrimination is on a particular ground, it is presumed to be unfair, unless there is some justification for the discrimination. The court could find no such justification and concluded that Mrs Robinson's constitutional right to equality and dignity had been unfairly prejudiced. It held in particular that domestic partnerships form a significant part of South African family law and stated:¹⁴⁶¹

“[T]o ignore them [ie, domestic partners] and to impose a particular religious view on their world is to undermine the dignity of difference and to render the guarantee of equality somewhat illusory insofar as a significant percentage of the population is concerned.”

The court accordingly ordered¹⁴⁶² that the omission from the definition of “survivor” in section 1 of the MSSA of the words “and includes the surviving partners of a life

¹⁴⁵⁶ At 70.

¹⁴⁵⁷ At 69.

¹⁴⁵⁸ “Regulating domestic partnerships – a necessary step in the development of South African family law” 2003(120)3 *SALJ* 610.

¹⁴⁵⁹ 2003(120)3 *SALJ* 625.

¹⁴⁶⁰ At 70.

¹⁴⁶¹ At 71.

¹⁴⁶² At 73.

partnership” is unconstitutional and invalid and it ordered a reading-in of those words. It also ordered¹⁴⁶³ that the following be read into section 1:

“‘Spouse’ for purposes of this Act shall include a person in a permanent life partnership; ‘Marriage’ for purposes of this Act shall include a permanent life partnership.”

The executor of Mr Shandling’s estate appealed to the Constitutional Court¹⁴⁶⁴ against the order and Mrs Robinson simultaneously sought confirmation of the declaration of invalidity. A majority of seven judges upheld the appeal with three judges dissenting. The majority judgment was written by Skweyiya J and a separate concurring judgment was written by Ngcobo J. Sachs J wrote a dissenting judgment and Mokgoro and O’Regan JJ wrote a joint dissenting judgment. Due to the different views of the separate judgments, it is necessary to discuss them all.

The majority judgment by Skweyiya J gave a brief explanation¹⁴⁶⁵ of the history of the MSSA and stated that its purpose is to provide for the reasonable maintenance needs of parties to a marriage dissolved by death. The aim is to extend an invariable consequence of marriage beyond the death of one of the parties in order to deal with the perceived unfairness that arises from the fact that, at common law, the maintenance obligations of the parties to a marriage ceased at death. It therefore merely seeks to pass that obligation to the estate of a deceased partner and nothing more.¹⁴⁶⁶ The majority’s conclusion¹⁴⁶⁷ was that “survivor” in the MSSA was not capable of being interpreted as anything other than a survivor of a marriage recognised either by law or a religion and that heterosexual cohabitants could not be included in the ambit of “survivor”, as that would unduly strain the word and would be inconsistent with the context.¹⁴⁶⁸

¹⁴⁶³ At 73.

¹⁴⁶⁴ *Volks v Robinson* 2005 (5) BCLR 446 (CC).

¹⁴⁶⁵ At 458.

¹⁴⁶⁶ At 459.

¹⁴⁶⁷ At 459.

¹⁴⁶⁸ At 460.

The majority then considered¹⁴⁶⁹ the argument that the exclusion of heterosexual life partners violates their right to equality, leading to unfair discrimination. Without giving any reasons, Skweyiya J held¹⁴⁷⁰ that he is prepared to accept that it does amount to discrimination based on marital status. In deciding whether such discrimination is unfair, it is important to consider the differences between married people and unmarried people. The Constitution does not provide for a right to marry and have a family, but it does recognise marriage as an institution.¹⁴⁷¹ There are also several examples where recognition has been given to the importance of marriage and family as social institutions in our society, for example *Daniels v Daniels*; *Mackay v Mackay*;¹⁴⁷² *Belfort v Belfort*¹⁴⁷³ and *Dawood*.¹⁴⁷⁴ Because of this recognition of marriage, our law may distinguish between married and unmarried people and may in appropriate circumstances extend benefits to married people without also extending them to unmarried people.¹⁴⁷⁵ In a marriage, the rights of spouses are largely determined by the law – where parties cohabit, their rights are mainly determined by agreement between them. One such example is the duty of support that arises as a result of the operation of law in a marriage, but it will only arise between cohabiting couples if they agree to it. Couples who choose to marry do so cognisant of the legal obligations that arise on conclusion of the marriage as a result of the operation of law without the need for any further agreement.¹⁴⁷⁶ This includes obligations which extend beyond the term of the marriage or beyond death. The Constitution does not require that any obligation be placed on the estate of a deceased person if the law did not impose such obligation during the deceased's lifetime. It is therefore not unfair to distinguish between survivors of marriages and survivors of heterosexual life partnerships. To impose a duty on an estate where no such duty existed by operation of law during the lifetime of the

¹⁴⁶⁹ At 460.

¹⁴⁷⁰ At 461.

¹⁴⁷¹ See section 15(3)(a)(i).

¹⁴⁷² 1958 (1) SA 513 (A).

¹⁴⁷³ 1961 (1) SA 257 (A).

¹⁴⁷⁴ 2000 (2) SA 936 (CC).

¹⁴⁷⁵ At 463.

¹⁴⁷⁶ At 464.

deceased would be “incongruous, unfair, irrational and untenable”.¹⁴⁷⁷ The majority also referred to the argument that Mrs Robinson’s right to dignity had been violated, but held¹⁴⁷⁸ that this was not so – she was not being told that her dignity was worth less than that of a married person, but rather that for maintenance purposes there was a fundamental difference between her relationship and a marriage. The majority accordingly upheld¹⁴⁷⁹ the appeal and did not confirm the High Court order.

Ngcobo J in the main agreed with the view of the rest of the majority. He also referred¹⁴⁸⁰ to the fact that the law does not legally preclude heterosexual life partners from entering into marriage – all it does is to regulate the rights and duties of those heterosexual life partners who do choose marriage as the institution to govern their relationship. Their “entitlement to protection” under the MSSA therefore depends on their decision to marry or not.¹⁴⁸¹ He agreed¹⁴⁸² that, although the MSSA denies the surviving partners of a permanent life partnership the protection it gives to surviving spouses, it could not be said that the MSSA fundamentally impairs the right to dignity or the sense of equal worth of life partners who choose not to marry. He therefore concluded¹⁴⁸³ that the discrimination against such life partners is not unfair.

The dissenting judgment by Mokgoro J and O’Regan J also referred¹⁴⁸⁴ to marriage as an important social institution with extensive legal consequences. While marriage often results in the establishment of a family, the reality is that not every family is founded on a marriage recognised as such in our legal system.¹⁴⁸⁵ Members of such other families, however, play the same role as members of families founded on marriage.¹⁴⁸⁶ The

¹⁴⁷⁷ At 464.

¹⁴⁷⁸ At 465.

¹⁴⁷⁹ At 467.

¹⁴⁸⁰ At 473.

¹⁴⁸¹ At 473.

¹⁴⁸² At 476.

¹⁴⁸³ At 474.

¹⁴⁸⁴ At 476.

¹⁴⁸⁵ At 477.

¹⁴⁸⁶ At 477.

constitutional values therefore require that families established outside civilly recognised marriage should not be subject to unfair discrimination.¹⁴⁸⁷ If a law regulates the consequences of a permanent life partnership differently from those of a marriage, that law will be *prima facie* discriminatory.¹⁴⁸⁸ The question then is whether the discrimination is unfair. The minority held¹⁴⁸⁹ that, should such discrimination not be unfair, the inevitable outcome will be that marriage remains privileged, which will not serve the constitutional purpose of section 9(3) of the Constitution which prohibits unfair discrimination based on (*inter alia*) marital status. Cohabiting partners are a vulnerable group and excluding them from the operation of the MSSA could have a grave impact and would constitute unfair discrimination.¹⁴⁹⁰ The next determination is whether the unfair discrimination is reasonable and justifiable in terms of section 36 of the Constitution.¹⁴⁹¹ The purpose of the MSSA is to alter the common law rule that a surviving spouse has no right to maintenance after the death of the other spouse, and there is no reason why this purpose cannot be achieved by including surviving partners of cohabitation relationships in which mutual duties of support have been undertaken.¹⁴⁹² The judges accordingly found¹⁴⁹³ that there is no justification for the unfair discrimination. They suggested¹⁴⁹⁴ that the unconstitutionality in section 2(1) of the MSSA could be remedied by reading into the definition “*and including the surviving partners of a permanent heterosexual life partnership terminated by the death of one partner in which the parties undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner’s estate*” (emphasis added). They ordered¹⁴⁹⁵ that the omission of the words referred to above was unconstitutional and ordered¹⁴⁹⁶ the reading-in of the words.

¹⁴⁸⁷ At 477.

¹⁴⁸⁸ At 478.

¹⁴⁸⁹ At 482.

¹⁴⁹⁰ At 487.

¹⁴⁹¹ At 488.

¹⁴⁹² At 488.

¹⁴⁹³ At 489.

¹⁴⁹⁴ At 490.

¹⁴⁹⁵ At 491.

¹⁴⁹⁶ At 492.

They also confirmed¹⁴⁹⁷ the High Court order that the omission of the definitions of “spouse” and “marriage” were unconstitutional and invalid and ordered that the abovementioned words be read in as requested. They, however, suspended the order for two years to enable the legislature to cure the constitutional defects in the Act. Failing such cure, the order of invalidity would have no effect on the validity of any acts performed in the administration of a deceased estate finally wound up by the date on which the order of invalidity came into effect.¹⁴⁹⁸ It should be noted that, despite the order, the judges found¹⁴⁹⁹ on the facts that Mrs Robinson was adequately provided for in Mr Shandling’s will and that she was not entitled to any further relief from the court. The dissenting judgment by Sachs J emphasised¹⁵⁰⁰ that the fairness of the Act should be assessed within the framework of family law, rather than the narrow confines of matrimonial law. He considered the socio-legal context of patriarchy and poverty¹⁵⁰¹ and the move from marriage law to family law.¹⁵⁰² He referred¹⁵⁰³ specifically to the Discussion Paper¹⁵⁰⁴ issued by the South African Law Reform Commission on domestic partnerships, which clearly indicates the need for legal regulation to address disputes arising from cohabitation relationships. The judge suggested¹⁵⁰⁵ that we should move away from the definitional argument that extends rights only to those who comply with the current definition of marriage to a functional argument that advocates a reconsideration of how marriage is defined in light of the changes to marriage over time. The judge referred¹⁵⁰⁶ to several laws that have recognised domestic partnerships since 1994 and concluded¹⁵⁰⁷ that the changes to society make it necessary to establish a new legal landscape consistent with the values of diversity, tolerance of difference and

¹⁴⁹⁷ At 492.

¹⁴⁹⁸ At 492.

¹⁴⁹⁹ At 491.

¹⁵⁰⁰ At 494.

¹⁵⁰¹ At 499.

¹⁵⁰² At 500.

¹⁵⁰³ At 501.

¹⁵⁰⁴ *Discussion Paper 104 Domestic partnerships Project 118*. See 5.3.4 for a further discussion.

¹⁵⁰⁵ At 502.

¹⁵⁰⁶ At 503.

¹⁵⁰⁷ At 507.

concern for human dignity as expressed in the Constitution. He found¹⁵⁰⁸ that the “blanket nature” of the exclusivity principle resulted in unfair discrimination in conflict with section 9(3) of the Constitution. He then considered whether there was any justification of the principle of exclusivity and noted¹⁵⁰⁹ that there could be two possible justifications:

- The burden of proof – he found¹⁵¹⁰ that this was not “insuperable” and that any difficulties in determining whether a life partnership existed should relate rather to the remedy than the actual existence of a partnership;
- Departing from the exclusivity principle may undermine the institution of marriage – while acknowledging¹⁵¹¹ that marriage has to be privileged, he found no reason for it to be exclusive.

The judge accordingly found¹⁵¹² that the continued blanket exclusion of domestic partnerships from the ambit of the MSSA, despite the degree of commitment shown to the family by the survivor, cannot be justified and that the MSSA is invalid to that extent. He agreed¹⁵¹³ that the order of unconstitutionality be suspended for two years to give Parliament time to remedy the defect. He also found that, on the facts, Mrs Robinson did not have any right to claim because reasonable provision had been made for her in terms of Mr Shandling’s will.

This judgment raises some issues of concern. I find the conclusion in the dissenting judgments that the words “... *and in circumstances where the surviving partner has not received an equitable share in the deceased partner’s estate*” (emphasis added) should form part of the definition disconcerting. The basis of the judgment is that unmarried couples should be protected if they take on the duty of support that automatically applies to couples who marry. Why then should there be a further requirement that the

¹⁵⁰⁸ At 522.

¹⁵⁰⁹ At 522.

¹⁵¹⁰ At 522.

¹⁵¹¹ At 524.

¹⁵¹² At 524.

¹⁵¹³ At 525.

protection will only apply in the absence of an equitable share of the deceased partner's estate? This is, after all, not a requirement for married couples. Smith¹⁵¹⁴ agrees that these words would add an additional criterion which is not imposed on a surviving spouse and suggests¹⁵¹⁵ that these words are in any event redundant as the MSSA already contains the necessary measures in section 3 to ensure that the survivor's claim will be assessed based on his or her means and needs. Cooke also questions¹⁵¹⁶ why the judges limited the suggested relief to circumstances where the survivor did not receive an equitable distribution from the partner's estate.

This case understandably sparked a lot of comments. Criticism has been levelled at the majority for not recognising that there was indeed a contractual duty of support between the parties.¹⁵¹⁷ Smith¹⁵¹⁸ criticises the court's view that there is no reciprocal duty of support where only one party earns an income. He notes¹⁵¹⁹ that there is no requirement that both partners should factually contribute towards reciprocal maintenance on a continual basis – what is required is a commitment in this respect, which then results in a reciprocal duty of support based on a contract. From the facts of the case, it was clear that there was a reciprocal duty of support between the parties.¹⁵²⁰ Cooke¹⁵²¹ criticises the dissenting judgments for the suggestion that Mrs Robinson was not entitled to relief because she had been provided for in Mr Shandling's will. As Cooke indicates,¹⁵²² the dissenting judges did not even consider whether Mrs Robinson was in need of reasonable maintenance and simply accepted that the

¹⁵¹⁴ Unpublished LLD thesis, University of the Free State (2009) 257.

¹⁵¹⁵ At 256.

¹⁵¹⁶ 2005(122)3 SALJ 547.

¹⁵¹⁷ See, for example, Lind "Domestic partnerships and marital status discrimination" 2005(1) *Acta Juridica* 108,122-123; Smith Unpublished LLD thesis, University of the Free State (2009) 271.

¹⁵¹⁸ "Rethinking *Volks v Robinson*: the implications of applying a 'contextualised choice model' to prospective South African domestic partnership legislation" 2010(13)3 *PER/PELJ* 248-249.

¹⁵¹⁹ At 249.

¹⁵²⁰ See Schäfer "Marriage and marriage-like relationships: constructing a new hierarchy of life partnerships" 2006(123)4 SALJ 626,643 who shares this view.

¹⁵²¹ 2005(122)3 SALJ 555.

¹⁵²² At 555.

inheritance rendered her sufficiently provided for. Cooke suggests¹⁵²³ that the finding in the majority decision of Skweyiya J that Mrs Robinson's right to dignity had not been infringed implies that a person who chooses not to get married when he or she has the option to do so, must live with the consequences of such a choice.¹⁵²⁴ She suggests¹⁵²⁵ that the majority judgment was formalistic in distinguishing between marriage and life partnerships,¹⁵²⁶ whereas the dissenting judgment of Mokgoro J and O'Regan J is more nuanced and looks at the function of the relationship rather than the formalistic nature thereof. She questions¹⁵²⁷ the majority's failure to consider the equality jurisprudence of the Constitutional Court, the vulnerability of life partners,¹⁵²⁸ and the impact of the discrimination on them.¹⁵²⁹ She also criticises¹⁵³⁰ the fact that the majority judgment failed to find that the exclusion of life partners from the ambit of the MSSA would have an impact on their dignity. She opines¹⁵³¹ that the majority failed to give sufficiently convincing reasons for the decision it reached. Their main justification was that marriage should be protected and that people's autonomy should not be undermined. She suggests¹⁵³² that it is difficult to see how the recognition of life partnerships as an alternative to marriage would threaten the protection of marriage. While acknowledging the merits of the autonomy argument, she suggests¹⁵³³ that it does not take into account the varied reasons why life partners do not marry and assumes that all life partners who have not married have deliberately and consciously chosen not to do so. The autonomy argument is especially pertinent in South Africa where ignorance of the law, poverty and gender inequality may all render the exercise of real choice academic.¹⁵³⁴ Smith¹⁵³⁵ agrees with this view and suggests that the option to marry

¹⁵²³ At 544.

¹⁵²⁴ See also Smith 2016(133)2 *SALJ* 293.

¹⁵²⁵ At 546.

¹⁵²⁶ Cooke refers to 'co-habitation'.

¹⁵²⁷ At 551.

¹⁵²⁸ Cooke refers to 'co-habitants'.

¹⁵²⁹ At 552.

¹⁵³⁰ At 552.

¹⁵³¹ At 552.

¹⁵³² At 552.

¹⁵³³ At 553.

¹⁵³⁴ At 553.

often exists in theory only. He is of the view¹⁵³⁶ that the majority judgment fails to appreciate the social context and practical realities that relate to choice, namely unequal power relations based on gender and, often, ignorance of the consequences of not formalising a relationship. Goldblatt¹⁵³⁷ echoes this and suggests that the theory of choice should be considered within the context of South Africa's divergent society. Heaton and Kruger¹⁵³⁸ also refer to the majority judgment's failure to grasp the context within which choices are made.

Cooke criticises¹⁵³⁹ the "deference to the legislature" displayed by all the judges. Section 39(2) of the Constitution mandates the Constitutional Court to develop the common law and to promote the spirit, purport and objects of the Bill of Rights and she is of the opinion that the court should have intervened, possibly by way of a discretionary case-by-case remedy. She concludes¹⁵⁴⁰ by saying that the court missed an opportunity to remedy the situation of heterosexual life partners and this regrettably leaves them in a position of great vulnerability.

Domingo¹⁵⁴¹ also criticises¹⁵⁴² the majority judgment for failing to consider the "shifting nature" of marriage and family life within the greater social context in South Africa. She expresses surprise¹⁵⁴³ that the court acknowledged the plight of vulnerable women in life partnerships,¹⁵⁴⁴ but despite having the opportunity to protect them, chose to pass the problem to the legislature. Didishe¹⁵⁴⁵ points out that the decision highlights the

¹⁵³⁵ 2010(13)3 *PER/PELJ* 244.

¹⁵³⁶ 2010(13)3 *PER/PELJ* 245. See also Goldblatt 2003(120)3 *SALJ* 610,614,616; De Vos "Same-sex sexual desire and the re-imagining of the South African family" 2004(20)2 *SAJHR* 179,183 and Lind 2005(1) *Acta Juridica* 108,109-113.

¹⁵³⁷ 2003(120)3 *SALJ* 619.

¹⁵³⁸ *South African family law* 262.

¹⁵³⁹ At 557.

¹⁵⁴⁰ At 557.

¹⁵⁴¹ "Law of persons and family law" 2005(1) *Annual Survey of South African Law* 163.

¹⁵⁴² At 167.

¹⁵⁴³ At 169.

¹⁵⁴⁴ Domingo uses the term 'domestic partnerships'.

¹⁵⁴⁵ 2012(526) *De Rebus* 26.

clear conflict of values in society – on the one hand there is the entrenched value of marriage and on the other the values of equality and equal protection of the law.

Lind¹⁵⁴⁶ suggests¹⁵⁴⁷ that a big part of the problem in the judgment was that the social world has moved on to acknowledge the prevalence of cohabitation without marriage, but the rules of the law have not kept pace with these changes. He suggests¹⁵⁴⁸ that the court simply relied on the fact that the duty of support applied only to marriages and failed to consider whether such exclusivity remains legitimate in view of South Africa's constitutional transformation. He argues¹⁵⁴⁹ that the majority's view that the law is clear and unassailable is open to debate as he is not convinced that people necessarily know that cohabitation does not result in a legal maintenance obligation. He refers¹⁵⁵⁰ to research¹⁵⁵¹ done in the United Kingdom in which it was found that people in life partnerships¹⁵⁵² believed that similar consequences to marriage apply to their relationships, and suggests¹⁵⁵³ that there is no reason to think that people in South Africa do not hold the same beliefs. He suggests¹⁵⁵⁴ that a part of the problem could be that the Bill of Rights provides that people will be protected from discrimination on the ground of marital status and this could have added to the incorrect belief that life partnerships have the same legal consequences as marriage. I would agree with Lind in this regard and suggest that the average lay person is of the opinion that a life partnership results in certain legal consequences. Lind suggests¹⁵⁵⁵ that the court missed the opportunity to extend the support obligation to life partnerships and other family structures. He specifically criticises¹⁵⁵⁶ the court's insistence that there is no legal duty

¹⁵⁴⁶ 2005(1) *Acta Juridica* 108.

¹⁵⁴⁷ At 111.

¹⁵⁴⁸ At 114.

¹⁵⁴⁹ At 115.

¹⁵⁵⁰ At 116.

¹⁵⁵¹ Barlow *et al* "Just a piece of paper? Marriage and cohabitation in Britain" in Park *et al* (eds) *British social attitudes The 18th Report* (2001) 29-57.

¹⁵⁵² Lind uses the term 'cohabiting relationships'.

¹⁵⁵³ At 116.

¹⁵⁵⁴ At 116.

¹⁵⁵⁵ At 115.

¹⁵⁵⁶ At 121.

of support between life partners without considering whether this duty of support should not perhaps be reframed. He refers¹⁵⁵⁷ to the “choice” argument and questions why the fact that a person had factually supported another for a number of years should not be seen as the exercise of a choice by an individual undertaking a support obligation. Considering the autonomy argument the court used, he refers¹⁵⁵⁸ to the fact that the majority had placed some emphasises on the evidence given by the executor that Mr Shandling had expressly indicated that he never wanted to marry again. Mrs Robinson, in contrast, indicated that it was her wish to marry. Based on this, it would seem that the parties had conflicting wishes. Lind suggests¹⁵⁵⁹ that such a conflict can be overcome by honouring the autonomy expressed in the conduct of the parties – if a functional family relationship can be found to exist, it should be easy to construe a legal support obligation from the circumstances. He argues¹⁵⁶⁰ that, even if a person expressly refuses to undertake a duty of support, it would be just to ignore this if the facts show that the person had for a considerable period of time factually provided support to another person. He concludes¹⁵⁶¹ that the courts should develop the common law duty of support to provide for family support where there are actual relationships of dependence.

Smith¹⁵⁶² suggests that, while the dissenting judgment of Sachs J is by far the better one, it is also not flawless. He feels that the judge could have dwelled more on his brief statement¹⁵⁶³ that he could see “little reason in fairness” why an agreed duty of support should not survive the death of a partner and that he could have made a finding that there was indeed a factual reciprocal duty of support between Mrs Robinson and Mr Shandling, which required protection. Smith¹⁵⁶⁴ very eloquently sums up the effect of

¹⁵⁵⁷ At 122.

¹⁵⁵⁸ At 123.

¹⁵⁵⁹ At 123.

¹⁵⁶⁰ At 124.

¹⁵⁶¹ At 129.

¹⁵⁶² Unpublished LLD thesis, University of the Free State 2009 232.

¹⁵⁶³ At 519.

¹⁵⁶⁴ 2016(133)2 *SALJ* 293.

the judgment in *Volks* – as much as the judgment in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹⁵⁶⁵ provided the platform for the greater recognition of same-sex life partnerships,¹⁵⁶⁶ the judgment in *Volks* appears to have “shut and bolted the judicial door” on heterosexual life partnerships.¹⁵⁶⁷ This apparent distinction requires further investigation.

In a recent case, *Bwanya v Master of the High Court, Cape Town*,¹⁵⁶⁸ the application of the MSSA in the context of heterosexual life partners was again placed before the court. The applicant had lodged claims in terms of the ISA and the MSSA against the estate of her deceased life partner, but the executor rejected the claims and the applicant approached the court for an order declaring section 1(1) of the ISA and the definitions of “survivor”, “spouse” and “marriage” in section 1 of the MSSA unconstitutional and invalid insofar as they exclude partners in a permanent opposite-sex life partnership. The court went into quite some detail when considering the claim in respect of the ISA,¹⁵⁶⁹ but in relation to the claim against the MSSA it merely held¹⁵⁷⁰ that the principle of *stare decisis* meant that it was bound by the decision of the Constitutional court in *Volks*.

5.3.3 The application of the MSSA to heterosexual and same-sex life partners

The decision in *Gory* was rendered one week before the CUA was enacted, at a time when same-sex partners did not have the option to formalise their relationship. There

¹⁵⁶⁵ 2000 (2) SA 1 (CC).

¹⁵⁶⁶ See 5.3.2.1.2.

¹⁵⁶⁷ See also *Du Toit v Greyling* unreported, case number 78173/2014 [2016] ZAGPPHC 902, judgment delivered on 23 September 2016, where the court referred to the unequal protection granted to heterosexual and same-sex life partners after the decision in *Volks*.

¹⁵⁶⁸ [2020] ZAWCHC 111.

¹⁵⁶⁹ For purposes of this thesis, it suffices to note that the court did indeed find section 1(1) of the ISA unconstitutional and invalid.

¹⁵⁷⁰ At par 209.

was a common assumption¹⁵⁷¹ that the differentiation between the treatment of same-sex and heterosexual life partners would fall away once the prohibition on same-sex marriage was removed. In fact, the court in *Gory* stated¹⁵⁷² that “[o]nce [the impediment to same-sex marriages] is removed, then there would appear to be no good reason for distinguishing between unmarried heterosexual couples and unmarried same-sex couples in respect of intestate succession”. The court, however, also made the following statement:¹⁵⁷³

“Any change in the law pursuant to *Fourie* will not necessarily amend those statutes into which words have already been read by this Court so as to give effect to the constitutional rights of gay and lesbian people to equality and dignity. In the absence of legislation amending the relevant statutes, the effect of these statutes or decisions of this Court in cases like *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, *Satchwell*, *Du Toit* and *J v Director-General, Department of Home Affairs* will not change. The same applies to the numerous other statutory provisions that expressly afford recognition to permanent same-sex life partnerships.”

While the law did change pursuant to *Fourie* with the promulgation of the CUA, the latter Act does not contain any amendment to the statutes that had already been the subject of reading-in orders, nor does it in any other way limit the protection provided by the reading-in orders. This raises the question whether the previous extension of protection to same-sex life partners did in fact fall away.¹⁵⁷⁴ Many legal scholars¹⁵⁷⁵ were of the view that the protection extended to same-sex partners by *Gory* would continue to apply until the relevant statutes were amended. Same-sex life partners who

¹⁵⁷¹ See, for example, Skelton & Carnelley (eds) 212; Coetzee Bester and Louw “Domestic partners and ‘the choice argument’: *quo vadis?*” 2014(7)6 *PER/PELJ* 2955.

¹⁵⁷² At 263.

¹⁵⁷³ At 262.

¹⁵⁷⁴ *Duplan v Loubser* Unreported, case number 24589/2015 [2015] ZAGPPHC 849, judgment delivered on 23 November 2015 par 19; *Bwanya v Master of the Hugh Court, Cape Town* [2020] ZAWCHC 111; Smith 2010(13)3 *PER/PELJ* 261; Smith 2016(565) *De Rebus* 38; Smith 2016(133)2 *SALJ* 288.

¹⁵⁷⁵ See, for example, Heaton & Kruger 267; De Vos “The ‘inevitability’ of same-sex marriage in South Africa’s post-apartheid State” 2007(23)3 *SAJHR* 462; Smith & Robinson “The South African Civil Union Act 17 of 2006: a good example of the dangers of rushing the legislative process” 2008 *Brigham Young University Journal of Public Law* 430, 439; Smith 2016(565) *De Rebus* 38; Smith “Surviving heterosexual life partners and the Intestate Succession Act 81 of 1987: a ‘test case’ for the fashioning of an appropriate constitutional remedy in cases of ‘judicially generated residual discrimination’” 2016(32)1 *SAJHR* 3; Smith 2016(133)2 *SALJ* 289.

failed to enter into a civil union would therefore still be able to claim spousal benefits that were extended to them prior to the CUA, even though they now had the option of formalising their relationship.¹⁵⁷⁶ Although the order in *Volks* related to the right to a claim under the MSSA, it was assumed by some writers that the order extended to all spousal benefits,¹⁵⁷⁷ which meant that heterosexual life partners would also remain excluded from the benefits of the ISA, even if they could prove that they had undertaken reciprocal duties of support.¹⁵⁷⁸ This is in contrast to the position of same-sex couples after the *Gory* decision, which led to the view¹⁵⁷⁹ that same-sex life partners are entitled to more protection than their heterosexual counterparts.

The constitutional rights of equality before the law, equal protection and benefit of the law means that heterosexual and same-sex partners who have not entered into marriage or a civil union should be treated the same.¹⁵⁸⁰ If they are not treated alike, the spirit of the Constitution and the Bill of Rights is being undermined. Smith¹⁵⁸¹ is of the view that different treatment amounts to unfair discrimination against heterosexual partners on the basis of both marital status and sexual orientation. Quoting *Minister of Finance v Van Heerden*,¹⁵⁸² he refers¹⁵⁸³ to this as a “new pattern [...] of disadvantage as a (presumably unintended) residual by-product of earlier case law in which constitutional remedies have been employed to broaden the ambit of a (pre-1994) piece of legislation”. He suggests¹⁵⁸⁴ that a future court would be constitutionally obliged to

¹⁵⁷⁶ Coetzee Bester and Louw 2014(7)6 *PER/PELJ* 2956.

¹⁵⁷⁷ Smith in Heaton (ed) 401; Kruuse “Here’s to you Mrs Robinson: peculiarities and paragraph 29 in determining the treatment of domestic partnerships” 2009(25)2 *SAJHR* 389-391; Smith and Heaton 2012(75)3 *THRHR* 484.

¹⁵⁷⁸ Heaton & Kruger 267; Smith in Heaton (ed) 398; Wood-Bodley 2008(125)1 *SALJ* 54,59.

¹⁵⁷⁹ See, for example, De Vos 2007(23)3 *SAJHR* 432,462; De Vos & Barnard (2007) *SALJ* 823-824; Wood-Bodley 2008(125)1 *SALJ* 54,59; Kruuse 2009(25)2 *SAJHR* 389-391; Smith 2010(13)3 *PER/PELJ* 238,261; Smith and Heaton 2012(75)3 *THRHR* 484; Coetzee Bester and Louw 2014 (7)6 *PER/PELJ* 2956.

¹⁵⁸⁰ Heaton & Kruger 267; Skelton & Carnelley (eds) 216; Smith & Heaton 2012(75)3 *THRHR* 481.

¹⁵⁸¹ 2016(565) *De Rebus* 39.

¹⁵⁸² 2004 (6) SA 121 (CC) par 27.

¹⁵⁸³ “Surviving heterosexual life partners and the Intestate Succession Act 81 of 1987: a ‘test case’ for the fashioning of an appropriate constitutional remedy in cases of ‘judicially generated residual discrimination’” 2016(32)1 *SAJHR* 2.

¹⁵⁸⁴ 2016(32)1 *SAJHR* 3.

extend the right to inherit on intestacy to heterosexual partners who satisfy the “threshold criteria” of a reciprocal duty of support referred to for same-sex partners in *Gory*.

Some writers¹⁵⁸⁵ argue that preferential treatment of same-sex partners is justified because the ongoing prevalence of homophobia in our society suggests that there is no substantive equality for such partners. Ntlama¹⁵⁸⁶ argues that the preferential treatment of same-sex partners is acceptable because the CUA does not give sufficient recognition to the status of same-sex couples – their right to equal access to marriage is limited because the Marriage Act still applies only to heterosexual partners. While this is a valid point, I would argue that this is not an impediment. The CUA specifically provides¹⁵⁸⁷ that the result of a civil union is that the legal consequences of a marriage in terms of the Marriage Act will apply to the union. That means that same-sex partners who have entered into a civil union are protected by the CUA and their union will have the same legal protection as that of a marriage in terms of the Marriage Act, despite the fact that they are precluded from entering into a marriage under the Marriage Act. Wood-Bodley¹⁵⁸⁸ contends that homophobia is ongoing in South Africa, despite the enactment of the CUA, and this could suggest that the ongoing differentiation between heterosexual and same-sex life partners is permitted. De Ru¹⁵⁸⁹ echoes Wood-Bodley’s reference¹⁵⁹⁰ to the continuing homophobia in our society and suggests¹⁵⁹¹ that this may imply that same-sex partners are still disadvantaged and require protection. She refers¹⁵⁹² to section 9(2) of the Constitution which provides that legislative and other

¹⁵⁸⁵ See, for example, Bilchitz & Judge “For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa” 2007(23)3 *SAJHR* 496; Picarra 2007(23)3 *SAJHR* 565 at note 47; Wood-Bodley 2008(125)1 *SALJ* 54.

¹⁵⁸⁶ “A brief overview of the Civil Union Act” 2010(13)1 *PER/PELJ* 1.

¹⁵⁸⁷ Section 13.

¹⁵⁸⁸ 2008(125)1 *SALJ* 46.

¹⁵⁸⁹ “The recognition of same-sex unions in South Africa” Unpublished LLM Dissertation University of South Africa November (2009) 130.

¹⁵⁹⁰ 2008(125)1 *SALJ* 54.

¹⁵⁹¹ At 130-132.

¹⁵⁹² At 132.

measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken to promote the achievement of equality. She argues¹⁵⁹³ that the retention of spousal benefits for permanent same-sex life partners by means of statutory provisions and judicial developments might qualify as “measures” aimed at achieving substantive equality.

I cannot agree with those writers that suggest that the ongoing differentiation is acceptable. I would concede that, despite legislative intervention, there still is ongoing homophobia in our society – not necessarily in society as a whole, but certainly in some parts thereof. This could imply that, despite being able to legally formalise their relationship, some same-sex partners still find it practically impossible to do so. I do not, however, believe that this is sufficient reason to extend rights and protection to them, but to deny the same rights and protection to heterosexual partners who have not formalised their relationship. As Goldblatt¹⁵⁹⁴ points out, the idea that all people who enter into family arrangements are on an equal footing, is flawed. I agree with Smith¹⁵⁹⁵ that it cannot simply be assumed that parties who fail to formalise their relationship even if they have the choice to do so, have made a mutual decision in this regard. As he points out,¹⁵⁹⁶ such an assumption ignores the social context and practical realities such as “unequal and gendered power relations”. This view has been echoed by several other writers.¹⁵⁹⁷

If it is therefore accepted that there is differentiation between same-sex life partners and heterosexual life partners and that it is not acceptable, what is the solution? Heaton and Kruger¹⁵⁹⁸ suggest that until legislation is passed to regulate equality, the solution would be to extend the protection given to same-sex life partners to heterosexual

¹⁵⁹³ At 143.

¹⁵⁹⁴ 2003(120)3 *SALJ* 610, 616.

¹⁵⁹⁵ 2010(13)3 *PER/PELJ* 245.

¹⁵⁹⁶ 2010(13)3 *PER/PELJ* 245.

¹⁵⁹⁷ See, for example, Goldblatt 2003(120)3 *SALJ* 610, 614, 616; De Vos 2004(20)2 *SAJHR* 179, 183; Lind 2005(1) *Acta Juridica* 108, 109-113; Cooke 2005(122)3 *SALJ* 553.

¹⁵⁹⁸ *South African family law* 268. See also Smith & Heaton 2012(75)3 *THRHR* 481.

partners, rather than take away the protection from same-sex partners. Kruuse¹⁵⁹⁹ refers to the fact that, even amongst other cohabitants, there is also still inequality in respect of cohabitants in South Africa where family roles remain “profoundly gendered spaces”. She also suggests¹⁶⁰⁰ that the protection extended to same-sex couples be retained and similar protection extended to heterosexual life partners.

There are, however, some legal scholars¹⁶⁰¹ who suggest that the *ratio* in *Volks* was limited to claims under the MSSA, which means that MSSA claims by same-sex partners are not yet permitted in our law and they are therefore treated the same as their heterosexual counterparts. This view is premised on the *ratio* in *Volks* that partners who have a choice to, but do not, formalise their relationship, cannot claim the protection provided by the law. As the CUA gives same-sex life partners the legal avenue to formalise their relationship, those who do not, cannot claim the protection that was extended by *Gory* at a time when formalisation of the relationship was not legally possible.

In a recent article, Smith¹⁶⁰² suggests¹⁶⁰³ that the decision in *Duplan* casts doubts on the views previously held by many scholars, himself included, as to the broad impact of *Volks*.¹⁶⁰⁴ He refers to the question raised earlier whether the promulgation of the CUA legislation did not perhaps have the effect that the decision in *Gory* would no longer apply as there was no longer a need to extend protection to same-sex partners. The applicant in *Duplan* contended that, as the CUA gave same-sex partners the choice to marry, the decision in *Volks* should also apply to same-sex couples who choose not to marry so that they are prevented from inheriting under the ISA. The court, however,

¹⁵⁹⁹ “2009(25)2 SAJHR 386.

¹⁶⁰⁰ “You reap what you sow: regulating marriages and intimate partnerships in a diverse, post-apartheid society” in Atkin & Banda (eds) *The International Survey of Family Law* (2013) 380-391.

¹⁶⁰¹ See, for example, De Vos & Barnard (2007) SALJ 823; Skelton & Carnelley (eds) *Family law in South Africa* (2010) 212,232; Smith in Heaton (ed) (2014) 458; Schäfer “Same sex life partnerships” in *Family Law Service* (Service Issue 73, 2020 LexisNexis) at R36).

¹⁶⁰² “Have we read *Volks* wrong all along? *Laubscher v Duplan* 2017 2 SA 624 (CC)” 2018(81)1 THRHR 149.

¹⁶⁰³ At 150.

¹⁶⁰⁴ Unreported, case 24589/2015 [2015] ZAGPPHC 849, judgment delivered on 23 November 2015.

found that the two cases were distinguishable on a few points, one being that *Volks* dealt with inheritance claims whereas *Duplan* dealt with maintenance claims. Maintenance and intestate succession are different systems meant to address different needs.¹⁶⁰⁵ The court accordingly held¹⁶⁰⁶ that “*Volks* continues to apply with full precedential force within the context of maintenance of surviving spouses”.

Smith concludes¹⁶⁰⁷ that *Duplan* has provided clarity that *Gory* will continue to apply to same-sex life partners who bring claims under the ISA, but heterosexual life partners are still excluded from this benefit pending a successful constitutional challenge. The decision in *Bwanya v Master of the High Court, Cape Town*¹⁶⁰⁸ is such a constitutional challenge, but it has yet to be confirmed by the Constitutional Court.¹⁶⁰⁹ I think it is unlikely that the Constitutional court will not confirm the judgment, but until that happens, heterosexual life partners cannot inherit from each other on intestacy.

As far as claims under the MSSA is concerned, it has now been settled by *Duplan* that the decision in *Volks* will also apply to same-sex life partners who choose not to enter into a civil union, and they are therefore also excluded from the benefits of the MSSA. There accordingly no longer seems to be any differentiation between same-sex and heterosexual partners in the context of maintenance claims, but the question of course remains why both sets of couples should be excluded from the ambit of the MSSA, especially if they can prove that there are reciprocal duties of support. As the minority judgment in *Duplan* pointed out,¹⁶¹⁰ this is “residual unfair discrimination” that cannot be allowed to stand.

¹⁶⁰⁵ At par 48.

¹⁶⁰⁶ At par 50.

¹⁶⁰⁷ 2018(81)1 *THRHR* 160.

¹⁶⁰⁸ [2020] ZAWCHC 111.

¹⁶⁰⁹ Section 172(2)(a).

¹⁶¹⁰ At par 85.

The above discussion illustrates that the decision in *Gory* will most likely not facilitate a claim under the MSSA by a same-sex life partner, but it also shows that there is still some uncertainty regarding the legal position of MSSA claims by same-sex life partners. It is also clear from the majority judgment in *Duplan* that a “stimulating and persuasive” argument has been made for a court to overturn *Volks* in future. I submit that the uncertainty could be addressed by the legislature expressly catering for MSSA claims by surviving life partners by providing a definition that applies irrespective of whether they were involved in a same-sex or heterosexual life partnership.

5.3.4 Pending legislative development

The relative lack of legal recognition of cohabitants prompted the South African Law Reform Commission to conduct research in this regard. The result was the publication of a Discussion Paper¹⁶¹¹ in 2003. The document contained suggestions for the future recognition of domestic partnerships and the public was invited to comment. In 2006 the Commission issued a Report,¹⁶¹² and as a result of this, a chapter dealing with “domestic partnerships” was included in the first Civil Union Bill¹⁶¹³ published in August 2006. The chapter was later removed from the Bill and a separate Draft Domestic Partnerships Bill, 2008¹⁶¹⁴ was published in January 2008.

The purpose of the Bill is described as providing for the legal regulation of domestic partnerships, the enforcement of the legal consequences of domestic partnerships, and matters incidental thereto. The preamble sets the scene for the contents of the Bill and points out that section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. It further notes that there is no legal recognition or protection for opposite-sex couples in permanent

¹⁶¹¹ South African Law Reform Commission *Discussion Paper 104 Domestic partnerships* Project 118 Pretoria, 2003.

¹⁶¹² South African Law Reform Commission *Report on domestic partnerships* Project 118 Pretoria, 2006.

¹⁶¹³ 26 of 2006.

¹⁶¹⁴ General Notice 36 in *Government Gazette* 30663, 14 January 2008.

domestic relationships. A “domestic partnership” is defined¹⁶¹⁵ as a registered or unregistered domestic partnership between two persons eighteen years or older and includes a former domestic partnership. A “domestic partner” is defined as a partner in a domestic partnership and includes a former domestic partner.

The objectives of the Bill are stated¹⁶¹⁶ as being to ensure the rights of equality and dignity of partners in domestic partnerships and to reform family law to comply with the provisions of the Bill of Rights. The objectives are to be achieved through:

- Recognition of the legal status of domestic partners;
- Regulation of their respective rights and obligations;
- Protection of their interests, as well as those of interested third parties when the partnership terminates;
- Provision for the final determination of the financial relationship between the domestic partners and between them and interested parties on termination of the partnership.

The Bill distinguishes between registered and unregistered domestic partnerships.

A. Registered domestic partnerships

The South African Law Reform Commission in its Report¹⁶¹⁷ mentioned that the registered domestic partnership would serve as a “proper alternative” to marriage and that it would give the parties rights that are enforceable against third parties. That means that the duties inherent in the *consortium omnis vitae*, such as the legal duty of support, will also apply to registered domestic partners.¹⁶¹⁸ The Bill indeed provides that the result of a registered domestic partnership is that a reciprocal duty of support arises between the partners in accordance with their financial means and

¹⁶¹⁵ Clause 1.

¹⁶¹⁶ Clause 2.

¹⁶¹⁷ *Report on domestic partnerships Project 118 320.*

¹⁶¹⁸ See also Smith 2011(128)3 *SALJ* 576.

needs;¹⁶¹⁹ that they both have the right to occupy the family home, regardless of which partner owns or rents it;¹⁶²⁰ and that one partner may not dispose of joint property unless the other partner has given written consent.¹⁶²¹ In contrast to a civil marriage, the default matrimonial property regime of community of property does not apply to domestic partnerships,¹⁶²² but the partners may enter into an agreement to regulate the financial matters during the partnership.¹⁶²³ Provision is made that a court can set aside the agreement if it is satisfied that serious injustice will be caused if the agreement is given effect to.¹⁶²⁴

A registered domestic partnership will terminate on the death of one or both of the partners, by mutual agreement, or if a court orders termination thereof.¹⁶²⁵ If the partnership is terminated by death, a death certificate constitutes *prima facie* proof that it has ended.¹⁶²⁶ The Bill makes specific provision for maintenance after death and provides that a reference to “spouse” in the MSSA must be construed as including a registered domestic partner.¹⁶²⁷ The MSSA does not actually define “spouse”, as the only definition in this regard is “survivor”, which is defined as:

“the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act 3 of 1988)).”

This definition has been effective since 2009 – before that, the definition simply referred to a spouse in a marriage dissolved by death. The Domestic Partnerships Bill

¹⁶¹⁹ Clause 9.

¹⁶²⁰ Clause 11.

¹⁶²¹ Clause 10.

¹⁶²² Clause 7.

¹⁶²³ Clause 7(3).

¹⁶²⁴ Clause 8(2) and (3).

¹⁶²⁵ Clause 12(1).

¹⁶²⁶ Clause 12(2).

¹⁶²⁷ Clause 19.

was published in 2008, when the “simplified” definition of survivor in the MSSA applied and the provision in clause 19 of the Bill that a reference to “spouse” in the MSSA must be construed as including a registered domestic partner must be seen in that context. The provision in section 19 is supposed to give legal certainty,¹⁶²⁸ but as a result of the amplified definition of “survivor”, some uncertainty could arise. I would therefore suggest that, should the Domestic Partnerships Bill become law, the definition of “survivor” in the MSSA should also be amended to include “and a domestic partner in a registered domestic partnership as provided for in the Domestic Partnerships Act ...”.

The Bill also provides¹⁶²⁹ that a reference to “spouse” in the ISA must be interpreted to include a registered domestic partner.

In *Du Plessis v The Road Accident Fund*¹⁶³⁰ the Supreme Court of Appeal extended the common law action for damages for loss of support to a surviving same-sex life partner in a permanent life partnership where the partners had contractually undertaken to maintain one another. The court expressly left open the question whether the common law should be extended to also extend this to opposite sex partners. The Supreme Court of Appeal answered the question in the affirmative in *Paixão v Road Accident Fund*¹⁶³¹ and the Domestic Partnerships Bill proposes to bring further certainty in this regard as it provides¹⁶³² that partners in a registered partnership are deemed to be spouses in a legally valid marriage for the purposes of claiming damages in a delictual claim. The Bill also provides¹⁶³³ that a partner will be a dependant for purposes of the Compensation for Occupational Injuries and

¹⁶²⁸ Skelton & Carnelley (eds) 225.

¹⁶²⁹ Clause 20.

¹⁶³⁰ 2004 (1) SA 359 (SCA).

¹⁶³¹ 2012 (6) SA 377 (SCA).

¹⁶³² Clause 21(1) and (2).

¹⁶³³ Clause 21(3).

Diseases Act.¹⁶³⁴ This specific provision is necessary as the Compensation for Occupational Injuries and Diseases Act provides that someone living with an employee as “wife and husband”, and who is wholly or partially dependent on the particular employee, is entitled to claim compensation as the employee’s dependant if the employee is killed in the course of employment. This provision includes heterosexual partners in a permanent life partnership but not same-sex life partners. A registered domestic partnership can also be terminated by agreement between the parties.¹⁶³⁵ They can provide in the agreement for the division of property, maintenance after termination, arrangements in respect of the family home and any other matter relevant to the financial consequences of the termination. In the absence of an agreement regarding maintenance, the court may make an order it deems just and equitable.¹⁶³⁶ The court must have regard to certain factors when deciding whether to order the payment of maintenance and the amount and nature thereof, namely:

- The respective contributions of each partner to the registered domestic partnership;
- The existing and prospective means of each partner;
- The respective earning capacity, future financial needs and obligations of each partner;
- The age of the respective partners;
- The duration of the partnership;
- The standard of living of the partners prior to the terminations;
- Any other factor which the court feels should be included.

It is interesting to note that these factors are almost identical to the factors listed in section 3 of the MSSA. The one difference is that the Bill includes the respective contributions of each partner to the partnership. This is probably understandable in

¹⁶³⁴ 130 of 1993.

¹⁶³⁵ Clause 14.

¹⁶³⁶ Clause 18.

view of the reference to the relationship being regarded as a partnership – although it is not a partnership in the strict sense and the requirements for a partnership need not be present, one of the requirements of a partnership is that each party must contribute to it.

B. Unregistered domestic partnerships

The Bill envisages a judicial discretion model for these partnerships, which means that legal status is not automatically attached to these partnerships.¹⁶³⁷ The Bill provides¹⁶³⁸ that the partners can apply to the court for an order relating to maintenance, intestate succession or property division.

Where one of the domestic partners dies, the surviving partner may apply to court for an order for the provision of his or her reasonable maintenance needs, from the estate of the deceased partner, until his or her death, remarriage or registration of another registered domestic partnership, insofar as he or she is not able to provide therefore from his or her own means and earnings.¹⁶³⁹ This wording is similar to section 2(1) of the MSSA, with the necessary change in wording as required by the context of unregistered domestic partnerships. Clause 30 provides for the factors the court may consider when determining reasonable maintenance needs and is largely similar to section 3 of the MSSA, with the following differences:

- Clause 30 does not refer to the subsistence of the partnership
- It provides for the existence and circumstances of multiple relationships between the deceased and an unregistered domestic partner and between the deceased and a customary spouse.

¹⁶³⁷ Smith in Heaton (ed) 467.

¹⁶³⁸ Clause 26.

¹⁶³⁹ Clause 27.

As with the MSSA, the Bill provides¹⁶⁴⁰ that the surviving partner's claim for maintenance will have the same order of preference in respect of other claims as that of a dependent child. If, however, there are competing claims, the court may make an order that is just and equitable with reference to all the relevant circumstances of the partnership.¹⁶⁴¹ This arrangement seems to be more equitable than the provision in section 2(3)(b) of the MSSA which provides that the claims will be reduced proportionately.

The executor has the same power¹⁶⁴² as in section 2(3)(d) of the MSSA to enter into an agreement with the surviving partner and the heirs or legatees.

The surviving partner may apply for an order that he or she may inherit the intestate estate of his or her deceased partner.¹⁶⁴³ If the order is granted and the deceased partner is survived by a domestic partner and descendants, the partner will inherit¹⁶⁴⁴ a child's share or so much as does not exceed the amount fixed from time to time.¹⁶⁴⁵

If the partners did not agree on the division of their joint property or the separate property of each of them, either or both may apply to the court for an order that the court deems just and equitable.¹⁶⁴⁶

At this stage it is not clear when the Bill will eventually be enacted or what the final version will entail. Until this happens, or until our courts extend the protection of the MSSA also to heterosexual life partners who have not entered into a civil union or

¹⁶⁴⁰ Clause 29(3)(a).

¹⁶⁴¹ Clause 29(3)(b).

¹⁶⁴² Clause 29(3)(e).

¹⁶⁴³ Clause 31(1).

¹⁶⁴⁴ Clause 31(2).

¹⁶⁴⁵ This amount is currently R250 000: section 1(1)(c)(i) of the ISA read with Regulations 920 and 921 in Government Gazette 38238, 24 November 2014.

¹⁶⁴⁶ Clause 32.

marriage, a party to a heterosexual life partnership will not be able to claim maintenance from the deceased estate of his or her partner in terms of the MSSA.

5.4 Conclusion

While our law has made significant strides in extending to other relationships the benefits that traditionally applied only to marriages solemnised in terms of the Marriage Act, further development is required as far as same-sex and heterosexual life partnerships are concerned. It is evident from the discussion in this chapter that the treatment of such relationships by the judiciary is not aligned with the principles enumerated in the Bill of Rights.

In the previous chapter, reference¹⁶⁴⁷ was made to the two-legged approach suggested in *Jewaskewitz v Master of the High Court Polekwane* (sic)¹⁶⁴⁸ to a maintenance claim in terms of the MSSA. The court held that the first question is whether the claimant is legally entitled to a claim for maintenance against the estate¹⁶⁴⁹ and indicated that this question would be answered in the affirmative if the claimant was married to the deceased and the marriage existed at the time of the deceased's death. It is evident from the discussion in this chapter that the claim is not limited to persons who are married in terms of the Marriage Act and that the executor of a deceased estate must look much wider than the existence of such a marriage when determining whether the claimant can fulfil the first leg of the two-legged enquiry. The executor must have a detailed knowledge of family law to enable him or her to determine whether the MSSA will apply to the relationship of the deceased and the claimant. It is clear from the discussion in 5.3.3 that the legal position pertaining to MSSA claims by same-sex partners who have not entered into a civil union is still uncertain. While I argue

¹⁶⁴⁷ At 4.4.1.

¹⁶⁴⁸ Unreported, case number 53514/2012 [2013] ZAGPPHC 118, judgment delivered on 16 May 2013.

¹⁶⁴⁹ At par 11.

above¹⁶⁵⁰ that the judgment in *Gory* could probably extend to claims by same-sex partners in terms of the MSSA, it appears from the decision in *Duplan* that the more likely legal position is that the ratio in *Volks* will also apply to same-sex partners who chose not to enter into a civil union. This lack of legal certainty means that the executor will be forced to make a decision in this regard. This aspect and the challenges it brings will be discussed in more detail in chapter 7.

¹⁶⁵⁰ See 5.3.3.

CHAPTER 6

COMPARATIVE PERSPECTIVE: THE LEGISLATIVE AND JUDICIAL POSITION IN ENGLAND AND NEW ZEALAND

6.1 Introduction

While the law in South Africa pertaining to the maintenance of a spouse after the death of the other spouse has clearly developed in a manner that is reflective of the diverse culture and society in the country, it might be useful to consider how legal systems in other jurisdictions deal with the maintenance of a spouse after the death of the other spouse. I have considered two jurisdictions, namely England and New Zealand.

The South African law of succession is based more on Roman-Dutch law than English law, but an investigation of the law in England offers good insights into how a first-world country deals with the maintenance of surviving spouses. New Zealand to a large extent inherited English statutes and common law when it was colonised in 1840.¹⁶⁵¹ It was the first common law country that gave the court discretion to intervene in the testamentary wishes of a deceased person if he or she did not make adequate provision for the maintenance and support of his or her spouse or children.¹⁶⁵² The legal development in New Zealand also had an impact on England and the Family Protection Act¹⁶⁵³ in New Zealand was the impetus for similar legislation in England.¹⁶⁵⁴ The country has a history of traditional law versus civil law, which could offer interesting insights for our position in South Africa. New Zealand provides a closer comparison to South Africa, as matrimonial property law applies on death in New Zealand, whereas it does not in England. As is the case in South Africa, family provision in New Zealand is available in

¹⁶⁵¹ Peart "Towards a concept of family property in New Zealand" 1996(10)2 *International Journal of Law, Policy and the Family* 105.

¹⁶⁵² Peart "New Zealand Report on new developments in succession law" 2010(14.2) *Electronic Journal of Comparative Law*, <http://www.ejcl.org/142/art142-3.pdf> (last accessed 3 July 2017).

¹⁶⁵³ 1955 No 88. See 6.3.3 for a discussion of the Act.

¹⁶⁵⁴ Peart & Borkowski "Provision for adult children on death – the lesson from New Zealand" 2000(12)4 *Child and Family Law Quarterly* 333.

addition to whatever relationship property rights the surviving spouse has. New Zealand also has a wider view of eligible relationships than England, and this allows for comparison with the wider meaning given to “spouse” in the MSSA. I will attempt to show that the courts in New Zealand exercise their discretion under the relevant legislation more liberally than English courts do.

6.2 England

6.2.1 General

The principle of freedom of testation has always been a cornerstone of English law.¹⁶⁵⁵ As expressed in *Vaughan v Marquis of Headfort*¹⁶⁵⁶ the law provides that “... every testator, in disposing of his property, is at liberty to adopt his own nonsense”. In *Boughton v Knight*¹⁶⁵⁷ the court held as follows:

“By the law of England everyone is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued.”

¹⁶⁵⁵ *Re Coventry (Deceased)* [1980] Ch 461; *Ilott v The Blue Cross* [2017] UKSC 17; Parry & Kerridge *The law of succession* (2016) 183; Miller 1980(1) *Acta Juridica* 54; Oldham “Financial obligations within the family – aspects of intergenerational maintenance and succession in England and France” 2001(60)1 *The Cambridge Law Journal* 150; Sloan “The concept of coupledness in succession law” 2011(70)3 *The Cambridge Law Journal* 623; Douglas, Woodward, Humphrey & Mills “Enduring love – attitudes to family and inheritance law in England and Wales” (2011) 38 *Journal of Law and Society* 248; Douglas “Family provision and family practices – the discretionary regime of the Inheritance Act of England and Wales” 2014(4)2 *Oñati Socio-legal series* (online) 226, <http://opo.iisj.ncl.index.php/osls/issue/view/32> (last accessed 4 July 2017); Purkis “Forcing the issue” 2017(166)7716 *New Law Journal* <https://www.newlawjournal.co.uk/content/forcing-issue> (last accessed 18 January 2018).

¹⁶⁵⁶ (1840) 10 Sim 639.

¹⁶⁵⁷ (1873) LR 3 P&D 64.

For purposes of this thesis I will consider the position in England since 1938, when the principle of complete freedom of testation changed¹⁶⁵⁸ with the promulgation of the Inheritance (Family Provision) Act 1938 (hereinafter referred to as the “IFPA”).¹⁶⁵⁹ The IFPA provided that a court would under certain circumstances have the power to declare a person’s testamentary dispositions invalid and replace them with dispositions that the court approves of.¹⁶⁶⁰ The principle of freedom of testation theoretically still existed, but it could be interfered with by the court, as succinctly explained by the court in *In re Brownbridge*:¹⁶⁶¹

“The Act did not throw upon a testator a duty to make provision for dependants. It only gave the Court a right to interfere if it came to the conclusion that the dispositions which were made were unwarranted.”

It is important to note that the IFPA merely gave the court the discretion to grant maintenance – it did not give any dependant of the testator a right to maintenance.¹⁶⁶²

The IFPA allowed claims against the estate of a deceased person by certain family members. The scope of the IFPA was limited – claims would only be allowed where the deceased had died leaving a will, and only four categories of applicant were provided for: the surviving spouse, an unmarried or incapacitated daughter, an infant son, and an incapacitated son.¹⁶⁶³ The IFPA allowed for provision to be made for the applicant’s maintenance, typically by way of periodical payments only, which payments would cease when the dependency ended.¹⁶⁶⁴

¹⁶⁵⁸ Parry & Kerridge 183.

¹⁶⁵⁹ This Act was based on the Testator’s Family Maintenance Act 1900, passed in New Zealand in 1900.

¹⁶⁶⁰ *Re Joslin* [1941] 1 All ER 302.

¹⁶⁶¹ [1942] 193 L.T. Jour 185.

¹⁶⁶² *Re Catmull* [1943] 2 All ER 115; Miller 1980(1) *Acta Juridica* 56.

¹⁶⁶³ Parry & Kerridge 184.

¹⁶⁶⁴ The Law Commission *Consultation Paper No 191 Intestacy and family provision claims on death* 15.

It appears that the IFPA gave rise to many problems¹⁶⁶⁵ and several pieces of legislation amending it followed:

- The Intestate Estates Act 1952¹⁶⁶⁶ extended the application of the IFPA to persons who died completely intestate;
- The Family Provision Act 1966¹⁶⁶⁷ provided that the court could also grant maintenance under the IFPA by way of a lump sum;
- The Family Law Reform Act 1969 extended the protection of the IFPA to illegitimate children born to a person who died after 1 January 1970 by including these children as dependants who could apply for maintenance in terms of the IFPA;
- The Law Reform (Miscellaneous Provisions) Act 1970¹⁶⁶⁸ provided that a surviving spouse who had *bona fide* entered into a void marriage with a testator, was also included as a dependant for purposes of the IFPA.

Despite all these developments and legislative extension, the crux of the IFPA remained, namely that no person had an entitlement to maintenance, and that the granting of maintenance was entirely at the discretion of the court.¹⁶⁶⁹ The court in *Re Joslin*¹⁶⁷⁰ expressed this as follows:

“The jurisdiction under this Act is one which it is extremely difficult for the court to administer. The judge is put in a most unhappy position in cases of this kind. However, it is a discretion, and it is a discretion which the court must exercise judicially... .”

The Inheritance (Provision for Family and Dependents) Act 1975 (“the 1975 Act”) substantially revised the legal position relating to provision for the family.¹⁶⁷¹ This Act

¹⁶⁶⁵ Jordaan Unpublished LLD thesis, University of South Africa (1987) 112.

¹⁶⁶⁶ The Intestate Estates Act applied to persons who died between 1 January 1953 and 31 December 1966.

¹⁶⁶⁷ Most of the sections of this Act came into operation on 1 January 1967. Two provisions came into operation at later dates.

¹⁶⁶⁸ Effective from 1 January 1971.

¹⁶⁶⁹ *Re Catmull* [1943] 2 All ER 115.

¹⁶⁷⁰ [1941] 1 All ER 302 at 305.

¹⁶⁷¹ Miller 1980(1) *Acta Juridica* 57.

implemented recommendations made by the Law Commission.¹⁶⁷² The most important changes the 1975 Act brought to the legislative landscape were to add to the classes of applicants, to increase and amend the standard of provision for spouses, to add to the orders a court can make, to add to the property out of which financial provision can be ordered and to include anti-avoidance provisions.¹⁶⁷³ The 1975 Act is still applicable today and regulates the position relating to maintenance for the family.

6.2.2 The 1975 Act

The preamble to the 1975 Act provides that its objective is “to make fresh provision for empowering the court to make orders for the making out of the estate of a deceased person of provision for the spouse, former spouse, child, child of the family or dependant of that person; and for matters connected therewith.”

The Law Commission¹⁶⁷⁴ had previously considered a system of fixed legal rights of inheritance, ie “forced heirship” rules as applied in many civil law jurisdictions, but instead decided upon a flexible system of family provision.¹⁶⁷⁵ While freedom of testation remains one of the basic principles of English law¹⁶⁷⁶ and the spouse and children do not have a right to inherit a certain portion of their spouse or parent’s estate,¹⁶⁷⁷ a person’s freedom to leave his or her estate to whomever he or she pleases is circumscribed by the 1975 Act, as it empowers the court to order that financial provision be made out of the person’s estate for certain categories of dependants.¹⁶⁷⁸ In *Gill v Woodall*¹⁶⁷⁹ the court held as follows:

¹⁶⁷² *Family law: second report on family property. Family provisions on death* (1974) Law Com No 61 HC 324.

¹⁶⁷³ Parry & Kerridge 184.

¹⁶⁷⁴ *Working Paper 42*, paras 0.36-0.41 and 4.69-4.72.

¹⁶⁷⁵ *Family Law: First report on family property. A new approach.* (1973) Law Com No 52 HC 274.

¹⁶⁷⁶ Jones “The future of forced heirship” October 2014 *STEP Journal* 76.

¹⁶⁷⁷ As opposed to the legitimate portion that applies in most civil law legal systems.

¹⁶⁷⁸ Sloan 2011(70)3 *The Cambridge Law Journal* 629.

¹⁶⁷⁹ [2010] EWCA Civ 1430.

“Subject to statutes such as the Inheritance (Provision for Family and Dependants) Act 1975, the law in this country permits people to leave their assets as they see fit, and experience of human nature generally, and of wills in particular, demonstrates that peoples’ wishes can be unexpected, inexplicable, unfair and even improper.”

Miller¹⁶⁸⁰ suggests that the certainty inherent in a rigid system of legal rights to inherit (ie forced heirship) is outweighed by the advantage of justice being applied in those individual cases that require it. Douglas¹⁶⁸¹ also supports a discretionary regime and suggests that such a regime, rather than a system of forced heirship, fits an approach to succession which focuses on the individual merits of a claim, as it allows the court to focus on the facts of the case. The rationale underlying the discretionary regime is to remedy *hardship* rather than uphold *justice* and it allows for individualised outcomes rather than ‘entitlement’ or certainty.¹⁶⁸²

The 1975 Act applies to persons who died after 1 April 1976 and who were domiciled in England and Wales.¹⁶⁸³ It does not impose any limitation on the applicant’s domicile or residency.¹⁶⁸⁴ It enables a person who regards him- or herself as unfairly treated by a deceased, either under a will or through the operation of the intestacy rules, to make a claim under the 1975 Act, provided he or she fits the eligibility criteria.¹⁶⁸⁵ An application may be made to the Chancery Division or the Family Division of the High Court, or the county court, all of which have unlimited jurisdiction to hear an application.¹⁶⁸⁶

¹⁶⁸⁰ 1980(1) *Acta Juridica* 58.

¹⁶⁸¹ 2014(4)2 *Oñati Socio-legal series* (online) 227.

¹⁶⁸² 2014 *Oñati Socio-legal series* (online) 4(2) 227.

¹⁶⁸³ Section 1(1).

¹⁶⁸⁴ *Witkowska v Kaminski* [2006] EWHC 1940 (Ch); Miller “Developments in family provision on death” *Family Law Week* <http://www.familylawweek.co.uk/site.aspx?i=ed103> (last accessed 20 January 2018).

¹⁶⁸⁵ Green “The Englishwoman’s castle: inheritance and private property today” 1988(51)2 *Modern Law Review* [online] 187-209 <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1988.tb01751.x/pdf> (last accessed 3 July 2017).

¹⁶⁸⁶ Parry & Kerridge 186.

6.2.2.1 Eligible applicants

Any of the defined categories of persons may apply to court for an order on the ground that the disposition to the applicant under the deceased's will or in terms of the laws of intestacy, or a combination of the will and the law of intestacy, does not make reasonable provision for the applicant.¹⁶⁸⁷ The first step in determining whether a person is eligible to make a claim under the 1975 Act is therefore to determine if he or she falls within the defined categories of persons who may claim.

The following categories of persons are listed:¹⁶⁸⁸

- The spouse or civil partner of the deceased.¹⁶⁸⁹ This category includes a judicially separated spouse and a party to a voidable marriage which has not been annulled.¹⁶⁹⁰ It also includes a party to a polygamous marriage.¹⁶⁹¹ A person who in good faith entered into a void marriage with the deceased also falls into this category, provided the person did not enter into a later marriage with a third party;¹⁶⁹²
- A former spouse or former civil partner of the deceased who has not entered into a subsequent marriage or civil partnership.¹⁶⁹³ "Former spouse" is defined¹⁶⁹⁴ as a person whose marriage with the deceased was, during the lifetime of the deceased, either dissolved or annulled by a decree of divorce or a decree of nullity of marriage granted under the law of any part of the British Islands, or dissolved or annulled in any country or territory outside the British Islands by a divorce or annulment which is entitled to be recognised as valid by

¹⁶⁸⁷ Section 1(1).

¹⁶⁸⁸ Section 1(1).

¹⁶⁸⁹ Section 1(1)(a). Civil partners were added by the Civil Partnership Act 2004.

¹⁶⁹⁰ Parry & Kerridge 200.

¹⁶⁹¹ *Re Sehota* [1987] 1 WLR 1506; Parry & Kerridge 200.

¹⁶⁹² Parry & Kerridge 200.

¹⁶⁹³ Section 1(1)(b).

¹⁶⁹⁴ Section 25.

the law of England and Wales. “Former civil partner” is defined¹⁶⁹⁵ as a person whose civil partnership with the deceased was, during the lifetime of the deceased, either dissolved or annulled by an order made under the law of any part of the British Islands, or dissolved or annulled in any country or territory outside the British Islands by a dissolution or annulment which is entitled to be recognised as valid by the law of England and Wales;

- A child of the deceased.¹⁶⁹⁶ This includes a child conceived but not yet born (“*en ventre sa mère*”), an “illegitimate” child (ie a child born of unmarried parents) and a child adopted by the deceased;¹⁶⁹⁷
- Any person (not being a child of the deceased) who was treated by the deceased as a child of the family in relation to a marriage or civil partnership to which the deceased was at any time a party;¹⁶⁹⁸
- Any person (not included in the categories above) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased.¹⁶⁹⁹ A person shall be treated as having been maintained by the deceased, either wholly or partly, if the deceased was making a substantial contribution in money or money’s worth towards the reasonable needs of that person and such contribution was otherwise than for full valuable consideration.¹⁷⁰⁰ An application under this section is made on the basis of dependency;¹⁷⁰¹ therefore it is not limited to relatives of the deceased or

¹⁶⁹⁵ Section 25.

¹⁶⁹⁶ Section 1(1)(c).

¹⁶⁹⁷ Section 25(1).

¹⁶⁹⁸ Section 1(1)(d).

¹⁶⁹⁹ Section 1(1)(e).

¹⁷⁰⁰ Section 1(3); *Re Beaumont* [1980] Ch 444; Douglas 2014(4)2 *Oñati Socio-legal series* (online) 229.

¹⁷⁰¹ *Miller Family Law Week* <http://www.familylawweek.co.uk/site.aspx?i=ed103> (last accessed 20 January 2018).

members of his or her household.¹⁷⁰² It could, for example, be brought by the sister,¹⁷⁰³ a mistress,¹⁷⁰⁴ a common law wife,¹⁷⁰⁵ parent¹⁷⁰⁶ and even a friend¹⁷⁰⁷ of the deceased. In *Graham v Murphy*¹⁷⁰⁸ the applicant and the deceased had cohabited for eighteen years and for a substantial part of that time it was in houses owned by the deceased. The applicant applied for reasonable provision from the deceased's estate on the basis that he had lived in the deceased's house and had cared for her. The court held that he was to be regarded as a dependant and awarded him sufficient funds to enable him to partly fund the purchase of a house. In *Jelley v Iliffe*¹⁷⁰⁹ the requirement of dependency was considered. The applicant was a widower who had moved in and lived with the deceased in a house owned by her for a number of years. The applicant applied under the 1975 Act for provision as her dependant. The court held that a determination of whether he was dependent on the deceased required a comparison of what he and the deceased had each contributed – if there was any indication that the deceased had been the greatest contributor, it would point to dependency on the applicant's side and the matter should go to trial. If, however, the evidence was that the applicant had made the biggest contribution, or if it was clear that their respective contributions were equal, no dependency existed, and the application should be struck as it was bound to fail. The court pointed out¹⁷¹⁰ that this comparison between what the respective parties had contributed is not an easy exercise and entails the making of moral or value judgements as it required balancing "imponderables", such as companionship and other services, with contributions of money or

¹⁷⁰² Parry & Kerridge 216.

¹⁷⁰³ *Re Viner (Deceased)* [1978] CLY 3091; *Re Wilkinson* [1978] 1 All ER 221.

¹⁷⁰⁴ *Malone v Harrison* [1979] 1 WLR 1353.

¹⁷⁰⁵ *Re C* (1979) 123 SJ 35; *Harrington v Gill* [1983] 4 FLR 265; *Bishop v Plumley* [1991] WLR 582.

¹⁷⁰⁶ Oldham 2001(60)1 *The Cambridge Law Journal* 151.

¹⁷⁰⁷ *Rees v Newberry and the Institute of Cancer Research* [1998] 1 FLR 1041.

¹⁷⁰⁸ [1997] 1 FLR 860.

¹⁷⁰⁹ [1981] Fam 128.

¹⁷¹⁰ At 138E.

accommodation. The court held¹⁷¹¹ that it should consider each case on its own merits and apply common sense to determine whether the applicant can be regarded as a dependant.¹⁷¹² This category of dependant is useful for an applicant who applies, but fails, on the basis of cohabitation, as he or she might still be able to prove that the deceased maintained him or her and thereby qualify as a dependant;¹⁷¹³

- A person who for the entire period of two years ending immediately before the date on which the deceased died,¹⁷¹⁴ was living in the same household as the deceased as the husband or wife¹⁷¹⁵ or civil partner¹⁷¹⁶ of the deceased. The reference to living as the husband or wife or civil partner implies that all aspects of the relationship must be considered so that it can be established whether the applicant and deceased had lived as spouses or civil partners. In *Re Watson (Deceased)*¹⁷¹⁷ the court held that the test is whether “a reasonable person with normal perceptions” would consider that the parties were living together as husband and wife, but it also cautioned¹⁷¹⁸ that “the multifarious nature of marital relationships” should not be ignored in the process. It appears that the fact that one of the parties was still in a subsisting marriage or civil partnership to a third party is not necessarily relevant when assessing the application.¹⁷¹⁹ In *Swetenham v Walkley & Bryce*¹⁷²⁰ the applicant and the deceased had been partners for 30 years at the time of his death, but did not have an intimate

¹⁷¹¹ At 141.

¹⁷¹² See also *Re B* [2000] 2 WLR 929 CA (Civ Div).

¹⁷¹³ *Churchill v Roach* [2002] EWHC 3230 (Ch); Sloan 2011(70)3 *The Cambridge Law Journal* 629.

¹⁷¹⁴ For an interpretation of this requirement refer to *Re Watson (Deceased)* [1999] 1 FLR 878; *Re Gully v Dix* [2004] EWCA Civ 139; *Witkowska v Kaminski* [2006] EWHC 1940 (Ch).

¹⁷¹⁵ Section 1(1)(ba) read with 1(1A). This section was inserted by the Law Reform (Succession) Act 1995 and applies where the deceased died on or after 1 January 1996.

¹⁷¹⁶ Section 1(1)(ba) read with 1(1B). This section was inserted by the Civil Partnership Act 2004 and has applied since 5 December 2005.

¹⁷¹⁷ [1999] 1 FLR 878 at 883.

¹⁷¹⁸ See also *Fitzpatrick v Sterling Housing Association Ltd* [1997] EWCA Civ 2169; *Ghaidan v Mendoza* [2004] UKHL 30; *Baynes v Hedger* [2008] WTLR 1719.

¹⁷¹⁹ *Churchill v Roach* [2002] EWHC 3230 (Ch); Sloan 2011(70)3 *The Cambridge Law Journal* 634.

¹⁷²⁰ [2014] WTLR 845.

relationship and also did not share their financial resources in a formal way. The deceased had a separate property, although he spent every day with the applicant at her house and apparently also stayed over many nights. He died intestate and the applicant brought a claim under the 1975 Act against his estate on the basis that they had lived together as husband and wife in the same household for at least the last two years before his death. In assessing the situation, the court referred to several other cases¹⁷²¹ that considered this particular issue and noted that most of these cases found that each case is fact sensitive and needs to be considered on its own merits. The court found that, although they did not share their finances, the applicant and deceased acted for all intents and purposes as husband and wife and their actions amounted to a “communal pot”. The court found that they had lived together as husband and wife in the same household for the purposes of the 1975 Act and made an award which was designed to enable the applicant to purchase a care plan to cover her care needs. In *Patel v Vigh*¹⁷²² the applicant and the deceased had been a couple for 24 years but had never married. Ms Vigh died intestate, leaving two children from a previous relationship. The court held that on the evidence presented, the applicant qualified as a cohabitee in terms of section 1(1)(ba) of the 1975 Act as the couple had been in a relationship immediately before the death of the deceased as required in section 1(1A), despite the fact that the deceased had spent the last two months of her life in hospital, where she died. Parry and Kerridge¹⁷²³ suggest that it would probably be easier for a judge to decide that an applicant is a cohabitant if the deceased left nobody else who has a strong claim to the estate. They question why a cohabitant who was not dependent on

¹⁷²¹ *Re Watson (Deceased)* [1990] 3 FCR 595; *Pounder v London Underground Limits* [1995] PIQR 217; *Churchill v Roach* [2002] EWHC 3230 (Ch); *Ghaidan v Godin-Mendoza* [2004] UKHL 30; *Gully v Dix* [2004] WTLR 331; *Kotke v Saffarini* [2005] EWCA Civ 221.

¹⁷²² [2013] EWHC 3403 (Ch).

¹⁷²³ *The law of succession* (2014) 221.

the deceased should be considered deserving to receive a part of the deceased's estate.¹⁷²⁴

Although the categories of persons who qualify to claim under the 1975 Act are clearly linked to the traditional idea of "family", it has been suggested¹⁷²⁵ that the introduction of dependence as a criterion allows the law to reflect an understanding of family based on how people have behaved towards each other and the duties they owe to each other, rather than merely their position within a (formal) family structure. This is specifically evident in the inclusion of persons who were maintained by the deceased – while the other categories of persons largely fit the traditional concept of "family", this category implies that any person who was maintained by the deceased to any extent, may apply for maintenance.

For purposes of this thesis I will concentrate only on the position of the spouse or civil partner, a person who lived with the deceased as a spouse or civil partner and a person who was dependent on the deceased, as those categories of persons are relevant when considering the position of the spouse in terms of the MSSA.

Once a person has established that he or she is eligible to claim under the 1975 Act, the court must follow a two-stage exercise.¹⁷²⁶ The first step is to determine whether reasonable financial provision was made for the applicant in the deceased's will, in terms of the laws of intestacy, or in terms of a combination of the will and the laws of intestacy.¹⁷²⁷ The test to determine this is objective,¹⁷²⁸ which means it must be

¹⁷²⁴ *The law of succession* (2014) 222. See also *Swetenham v Walkley & Bryce* [2014] WTLR 845; *Gordon v Legister* [2014] WLTR 1675.

¹⁷²⁵ Douglas 2014(4)2 *Oñati Socio-legal series* (online) 228.

¹⁷²⁶ *Lilleyman v Lilleyman* [2012] EWHC 821 (Ch); *Martin v Williams* [2017] EWHC 491 (Ch); Parry & Kerridge 192; Borkowski "Re Hancock (Deceased) and Espinosa v Bourke Moral obligation and family provision" 1999(11)3 *Child and Family Law Quarterly* 307; Douglas 2014(4)2 *Oñati Socio-legal series* (online) 232; Jordaan Unpublished LLD thesis, University of South Africa (1987) 127.

¹⁷²⁷ Section 2(1); *Re Coventry (Deceased)* [1980] Ch 474-475, 494-495; *Re Fullard* [1982] Fam 42, 46, 50; *Rajabally v Rajabally* [1987] 2 FLR 390; *Hanbury v Hanbury* [1999] 2 FLR 255.

¹⁷²⁸ *Re Barron v Woodhead* [2008] EWHC 810 (Ch).

answered from the viewpoint of the court and not the viewpoint of the applicant.¹⁷²⁹ Parry and Kerridge¹⁷³⁰ note that this first stage involves a “value” judgement by the court. Should it be found that reasonable financial provision was not made, the second step is to determine whether, and to what extent, the court should exercise the powers granted by the 1975 Act.¹⁷³¹ In contrast to the first stage, this is a question of discretion.¹⁷³²

6.2.2.2 Reasonable financial provision

The basis of a claim under the 1975 Act is that the deceased failed to make reasonable financial provision for the applicant.¹⁷³³ It is evident from the wording of section 3 that the benchmark for what is reasonable depends on the nature of the relationship between the deceased and the applicant. Parry and Kerridge¹⁷³⁴ refer to two standards: “the surviving spouse standard” and “the maintenance standard”.

The “surviving spouse standard” applies where the applicant is the spouse or civil partner of, or person who had *bona fide* entered into a void marriage with, the deceased. In such an instance, reasonable financial provision means such financial provision as it would be reasonable to receive taking all the circumstances into consideration, regardless of whether such provision is actually required for the applicant’s maintenance.¹⁷³⁵ This is a much wider approach than under the 1938 Act, which simply provided for reasonable provision for the maintenance of the spouse.¹⁷³⁶

¹⁷²⁹ *Re Goodwin* [1969] 1 Ch 283, 287; *Re Shanahan* [1972] Fam 1, 8; *Re Coventry (Deceased)* [1980] Ch 474-475, 488-489; Parry & Kerridge 192.

¹⁷³⁰ *The law of succession* 193.

¹⁷³¹ Sections 2(1) and 3(1).

¹⁷³² *Re Coventry (Deceased)* [1980] Ch 487; *Re Besterman* [1984] 3 WLR 280 CA; Parry & Kerridge 193.

¹⁷³³ Sections 1(1) and 2(1); *Rajabally v Rajabally* [1987] 2 FLR 390.

¹⁷³⁴ *The law of succession* 189.

¹⁷³⁵ Section 1(2)(a) and 1(2)(aa); *Davis v Davis* [1993] 1 FLR 54 CA; *Singer v Isaac* [2001] WTLR 1045 <http://www.lawteacher.net/cases/family-law/financial-matters-on-death.php> (last accessed 4 January 2017); Reed “Inheritance Act claims after White & Miller” *Family Law Week* <http://www.familylawweek.co.uk/site.aspx?i=ed548> (last accessed 5 January 2017).

¹⁷³⁶ *Re Coventry (Deceased)* [1980] Ch 461, 468, 484-485; *Re Besterman* [1984] 3 WLR 280 CA; Parry & Kerridge 189.

The Law Commission's justification for this new standard was that the surviving spouse's claim should be at least equal to the claim of a divorced spouse.¹⁷³⁷

The "maintenance standard" applies where the applicant is any other person in the listed categories. In such an instance, reasonable provision is limited to what is required for the maintenance of the person.¹⁷³⁸ Maintenance has been described¹⁷³⁹ as provision which will, directly or indirectly, enable the applicant to cover the costs of daily living, ie "to meet recurring living expenses of an income nature".¹⁷⁴⁰ It is more than just provision for the bare necessities of life¹⁷⁴¹ but less than "anything desired for his general benefit or welfare". In *Negus v Bahouse*¹⁷⁴² the deceased and the applicant had lived together for eight years. The deceased was also survived by adult children from two previous marriages. He made a will shortly before he started cohabiting with the applicant and never changed it. The will made no provision for the applicant. The court considered the lifestyle enjoyed by the couple, the age of the applicant, the length of time they spent as a couple and the factual evidence that the deceased had provided financially for her. It found that she was entitled to an award which would give her a reasonable degree of financial security. In *Webster v Webster*¹⁷⁴³ the applicant had cohabited with the deceased for 26 years. The court considered the meaning of "maintenance" in the context of a cohabitant and referred to *Re Coventry (Deceased)*¹⁷⁴⁴ where it was mentioned that maintenance would in all cases depend on the facts and circumstances of the particular case, that the meaning ascribed to the term should not be too limited and that the court should find a balance between "just enough to enable

¹⁷³⁷ Parry & Kerridge 189; *Family Law: Second Report on Family Property. Family Provision on Death* Law Com. No 61 HC 274 paras 12-18, 26-30; Jordaan Unpublished LLD thesis, University of South Africa (1987) 125.

¹⁷³⁸ Section 1(2)(b); Miller *Family Law Week* <http://www.familylawweek.co.uk/site.aspx?i=ed103> (last accessed 20 January 2018).

¹⁷³⁹ *Re Coventry (Deceased)* [1980] Ch 461, 485; Parry & Kerridge 190.

¹⁷⁴⁰ *Re Dennis (Deceased)* [1981] 2 All ER 140; *Re Jennings (Deceased)* [1994] Ch 286, 297-298; Oldham 2001(60)1 *The Cambridge Law Journal* 151.

¹⁷⁴¹ *Re E* [1966] 1 WLR 709, 715; *Re Coventry (Deceased)* [1980] Ch 461, 485, 494.

¹⁷⁴² [2007] EWHC 2628 (Ch).

¹⁷⁴³ [2008] EWHC 31 (Ch).

¹⁷⁴⁴ [1980] Ch 461 at 484.

a person to get by” and “anything which may be regarded as reasonably desirable for the general benefit or welfare”. In *Cattle v Evans*¹⁷⁴⁵ the applicant and the deceased had been in a relationship for many years and were engaged. The applicant applied under the 1975 Act for an order awarding her a property in Wales and cash. The court held that, as she had lived with the deceased for the last five years, she fell within the provisions of section 1(1)(ba) of the 1975 Act. The court found that it was reasonable for her to require to be housed in a property and continue to receive rental from her own property, but that it was not reasonable for her to own the property in which she could live. It quantified her housing needs and ordered that a property be purchased in trust for the deceased’s sons subject to her right of occupation. I find this case significant for the court’s finding that it was not reasonable to expect the applicant to occupy her existing property as that would leave her without an income. I suggest that the court made a very practical order, which is very different from the way in which our courts have placed the emphasis on giving the spouse funds to pay for his or her needs, rather than to consider giving him or her a place to live.

Douglas¹⁷⁴⁶ suggests that the standard for an applicant other than the spouse or civil partner is different because a spouse or civil partner would usually expect to inherit from the deceased spouse or civil partner’s estate. I find this suggestion problematic. English law does not give spouses an automatic right to share in each other’s property. I would, therefore, submit that it would be difficult to determine what a spouse or civil partner could reasonably have expected to inherit where the deceased died with a will. Where there was no will, the position is a bit clearer as the laws of intestacy¹⁷⁴⁷ provide that a spouse or civil partner will inherit a certain portion of the intestate estate – much the same as is provided for by the ISA in South Africa.

¹⁷⁴⁵ [2011] EWHC 945 (Ch).

¹⁷⁴⁶ 2014 *Oñati Socio-legal series* 4(2) 233.

¹⁷⁴⁷ Administration of Estates Act 1925. The details of the intestate laws are not relevant for purposes of this thesis and will not be discussed.

It is interesting to note that section 3(5) provides that the court shall have regard to the facts “as known by the court at the date of the hearing”. This means that the circumstances at the date of execution of a deceased person’s will or at the date of his or death will not be the determining factor¹⁷⁴⁸ and the court can take into account events that took place after the death of the deceased spouse but before the date of the hearing.¹⁷⁴⁹ I suggest that this is a practical and correct approach as it allows the court to take into consideration anything that might have significantly impacted on the spouse’s situation since the death of the other spouse. Assume, for example, that at the time of death reasonable provision has been made for the surviving spouse, but some time thereafter (while the administration of the estate is still ongoing) he or she is faced with an event that depletes all or most of his or her resources. If he or she then approaches the court for an order for reasonable provision, it would be problematic if the court was precluded from taking into account the fact that the applicant’s circumstances have changed dramatically. Conversely, if reasonable provision had not been made at the time of death, but the spouse thereafter received a large windfall such as an inheritance or lottery winning, surely that is something that the court should consider when dealing with an application? While there could in certain circumstances be merit in limiting the consideration to the time of death, especially if the applicant’s own negligence or intent resulted in the change in his or her situation, I would argue that this provision has little or no practical impact. The 1975 Act provides that the court shall consider the financial resources and financial needs of the applicant, as it is at the time of the application and likely to be in the foreseeable future,¹⁷⁵⁰ as well as “any other matter, including the conduct of the applicant”.¹⁷⁵¹ I believe that these provisions would be sufficient to allow the court to determine what weight it will apply to any events occurring after the death of the deceased but before lodging of the claim.

¹⁷⁴⁸ <http://www.lawteacher.net/cases/family-law/financial-matters-on-death.php> (last accessed 4 January 2017).

¹⁷⁴⁹ Parry & Kerridge 192.

¹⁷⁵⁰ Section 3(1)(a).

¹⁷⁵¹ Section 3(1)(g).

In exercising its discretion, the court must consider certain guidelines¹⁷⁵² – some of these are general and relate to every application, whereas some are specified for different categories of applicants:¹⁷⁵³

- The financial resources and financial needs which the applicant has or is likely to have in the foreseeable future.¹⁷⁵⁴ The court shall take into account not just the applicant's current earnings,¹⁷⁵⁵ but also his or her earning capacity.¹⁷⁵⁶ The applicant's financial resources include his or her capital assets such as immovable property, shares and investments.¹⁷⁵⁷ Parry and Kerridge¹⁷⁵⁸ point out though that it would not be correct to treat the applicant's home as expendable capital which must be used to maintain him or her.¹⁷⁵⁹ It seems that a similar approach is followed by South African courts – in *Feldman v Oshry*¹⁷⁶⁰ the court held that it would expose the applicant to risk and insecurity if she was required to sell her property in order to have funds to maintain herself. In his discussion of the case, Sonnekus¹⁷⁶¹ also mentions that, although he does not propose that the applicant should be compelled to sell her property, it could not be disregarded when determining her resources, as she could mortgage the property in order to obtain funds for her maintenance.

The English courts will take into consideration any pension or state aid received by the applicant.¹⁷⁶² It appears that the reference to resources which a person is likely to have in the foreseeable future include an inheritance the person is likely

¹⁷⁵² Section 3.

¹⁷⁵³ Parry & Kerridge 194.

¹⁷⁵⁴ Section 3(1)(1)(a).

¹⁷⁵⁵ *Re Ducksbury (Deceased)* [1966] 1 WLR 1226; *Malone v Harrison* [1979] 1 WLR 1364; Parry & Kerridge 195.

¹⁷⁵⁶ Section 3(b).

¹⁷⁵⁷ *Cattle v Evans* [2011] EWHC 945 (Ch); Parry & Kerridge 195.

¹⁷⁵⁸ *The law of succession* 195.

¹⁷⁵⁹ See also *Malone v Harrison* [1979] 1 WLR 1353.

¹⁷⁶⁰ 2009 (6) SA 454 (KZD)

¹⁷⁶¹ 2010-4 TSAR 817.

¹⁷⁶² *Re Catmull* [1943] 2 All ER 115; *Re Charman* [1951] 2 TLR 1095; *Re E* [1966] 1 WLR 709; *Re Clayton* [1966] 2 All ER 370; *Re Crawford* (1983) 4 FLR 273.

to receive.¹⁷⁶³ I find this problematic. There are many different aspects to an expected inheritance that could result in it not materialising – the person leaving the inheritance has to die, the will has to stay unchanged, the will has to be valid, the intended recipient has to be alive and the size of the estate and inheritance needs to remain such that the inheritance can be quantified. I would therefore submit that an inheritance that the applicant is likely to receive should not be taken into consideration when determining the financial resources of the applicant.

When considering the financial needs of any person, the court shall take into account his or her financial obligations and responsibilities.¹⁷⁶⁴ In *Re Barron v Woodhead*¹⁷⁶⁵ the wife died, leaving nothing in her will to her husband. At the time of her death the spouses were separated but had not commenced divorce proceedings. The deceased left most of her estate to her two children from a previous marriage. The husband brought a claim under the 1975 Act for reasonable provision out of her estate. The court took into consideration the fact that, before the wife died, the husband was bankrupt and had accordingly transferred assets to her in order to avoid his creditors;

- The financial resources and financial needs which any other applicant for an order under the 1975 Act has or is likely to have in the foreseeable future;¹⁷⁶⁶
- The financial resources and financial needs which any beneficiary of the deceased estate has or is likely to have in the foreseeable future.¹⁷⁶⁷ A “beneficiary” is defined¹⁷⁶⁸ as a person who under the will of the deceased or

¹⁷⁶³ *Morgan v Morgan* [1977] Fam 122; Parry & Kerridge 195.

¹⁷⁶⁴ Section 3(6).

¹⁷⁶⁵ [2008] EWHC 810 (Ch).

¹⁷⁶⁶ Section 3(1)(b).

¹⁷⁶⁷ Section 3(1)(c).

¹⁷⁶⁸ Section 25(1).

under the law relating to intestacy is beneficially interested in the estate or would be so interested if an order had not been made under the 1975 Act, and a person who has received any sum of money or other property which is treated as part of the intestate estate of the deceased in terms of section 8(1) and (2), or who would have received that sum or other property if an order had not been made under this Act. Section 8(1) deals with the situation where a person has in terms of the provisions of “any enactment” nominated another person to receive a sum of money or other property on his or her death. Section 8(2) applies to a sum of money or property received by another person as a *donatio mortis causa* made by a deceased person. Both sections provide that such sum of money or property (after deduction of capital transfer tax), shall for purposes of this Act be treated as part of the net estate of the deceased;

- Any obligations and responsibilities which the deceased had towards the applicant or any other applicant, or towards any beneficiary of the estate of the deceased.¹⁷⁶⁹ It appears that the reference to obligations and responsibilities includes moral obligations;¹⁷⁷⁰
- The size and nature of the net estate of the deceased.¹⁷⁷¹ “Net estate” includes any property which the deceased had the power to dispose of by his or her will, less the funeral, testamentary and administration expenses, debts and liabilities. It also includes any property in respect of which the deceased could exercise a general power of appointment and any sum of money or property which is treated as part of the net estate in terms of the provisions of sections 8(1) or (2),

¹⁷⁶⁹ Section 3(1)(d).

¹⁷⁷⁰ *Re Hancock (Deceased)* [1998] 2 FLR 346; *Espinosa v Bourke* [1999] 1 FLR 747; Borkowski 1999(11)3 *Child and Family Law Quarterly* 307, 310; Jordaan Unpublished LLD thesis, University of South Africa (1987) 129.

¹⁷⁷¹ Section 3(1)(e).

9, 10 or 11.¹⁷⁷² I referred to the provisions of section 8(1) and (2) above. Sections 9, 10 and 11 deal with situations where:

- a deceased person was immediately before his or her death entitled to the joint tenancy¹⁷⁷³ of any property;¹⁷⁷⁴
- the deceased made a disposition of assets for less than full valuable consideration to another person less than six years before the deceased's death with the intention of defeating an application for financial provision;¹⁷⁷⁵
- the deceased made a contract in terms of which he or she agreed to leave in his or her will a sum of money or other property to any person with the intention of defeating an application for financial provision, and full valuable consideration for the contract was not given or promised.¹⁷⁷⁶

In the situations mentioned above the assets will, subject to certain requirements, be treated as part of the net estate of the deceased for purposes of the 1975 Act;

- Any physical or mental disability of any applicant or any beneficiary of the estate of the deceased.¹⁷⁷⁷ The presence of a disability may give rise to an obligation on the deceased's part and, where there is already an obligation, it might increase the extent of the obligation.¹⁷⁷⁸ Jordaan¹⁷⁷⁹ suggests (and I agree) that a disability affects both the extent of the moral obligation of the deceased and the extent of the financial needs of the disabled person;

¹⁷⁷² Section 25.

¹⁷⁷³ Joint tenancy is similar to co-ownership in South African law.

¹⁷⁷⁴ Section 9.

¹⁷⁷⁵ Section 10.

¹⁷⁷⁶ Section 11.

¹⁷⁷⁷ Section 3(1)(f).

¹⁷⁷⁸ *Re Pointer (No 1)* [1941] Ch 60 Ch D; *Re Andrews* [1955] 1 WLR 1105; *Millward v Shenton* [1972] 1 WLR 71; Parry & Kerridge 198.

¹⁷⁷⁹ Unpublished LLD thesis, University of South Africa 1987 130.

- Any other matter, including the conduct of the applicant or any other person, which the court regards as relevant in the circumstances of the case.¹⁷⁸⁰ Parry and Kerridge¹⁷⁸¹ note that the reference to “any other person” includes the deceased.¹⁷⁸² The English courts have, for example, considered the conduct of the applicant in relation to the deceased and specifically whether she was a good and loving wife.¹⁷⁸³ The reference to “any other matter” is similar to section 3 of the MSSA which, in addition to the stated list of factors to be considered, also refers to “any other factor”. As mentioned in the discussion of the development of the MSSA,¹⁷⁸⁴ the Law Commission in South Africa suggested that a moral judgement should be avoided when determining a claim under the MSSA, as the MSSA is premised on the survivor’s right to support under certain circumstances rather than his or her moral right to share in the deceased spouse’s estate. I interpret this as meaning that the conduct of the application should not form part of the consideration. For purposes of the 1975 Act, the conduct of the applicant or any other person may also be relevant when assessing some of the other guidelines, such as the deceased’s obligations and responsibilities or the applicant’s contribution to the welfare of the family.¹⁷⁸⁵ The conduct of the deceased may be relevant when determining the reasonable provision that the applicant should receive.¹⁷⁸⁶
- Where the applicant was the spouse, civil partner, former spouse or former civil partner of the deceased, the court shall, in addition to the general guidelines mentioned above, also have regard to several other factors:

¹⁷⁸⁰ Section 3(1)(g).

¹⁷⁸¹ *The law of succession* 199.

¹⁷⁸² See, for example, *Re Thornley* [1969] 1 WLR 1037.

¹⁷⁸³ *Re Borthwick (No 2)* [1949] 1 All ER 472 Ch D; *Re Morris* [1967] CLY 4114; *Re Blanch* [1967] 1 WLR 987; *Re Thornley* [1969] 1 WLR 1037; *Re Snoek* (1983) 13 Fam Law 18.

¹⁷⁸⁴ See 4.4.2.

¹⁷⁸⁵ *H v H (Family provision: remarriage)* [1975] 2 WLR 124 Fam Div; *Re Snoek (Deceased)* (1983) 13 Fam Law 18; *Parish v Sharman* [2001] WTLR 593; Parry & Kerridge 204.

¹⁷⁸⁶ *Jones (Myrtle Agatha) v Jones (Webster)* [1976] 2 WLR 606; Parry & Kerridge 205.

- the age of the applicant;
- the duration of the marriage or civil partnership;¹⁷⁸⁷
- the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.¹⁷⁸⁸ This aspect has been the subject of several court cases. In *Re Snoek*¹⁷⁸⁹ the husband died, leaving a small estate. He made no provision for his wife and left his entire estate to his children. His wife claimed the entire estate as “reasonable provision” for herself under the 1975 Act. The court balanced the evidence given of her conduct towards the deceased with her earlier work in homemaking and raising the children and awarded her a cash amount from the estate, in addition to shares which the children had to give her from their own legacies. In *Iqbal v Ahmed*¹⁷⁹⁰ the deceased and his wife had been married for 22 years. The wife was entirely dependent on the deceased for financial support. The deceased had made a will in which he left the ownership of the marital home to his son from a previous marriage and the right to occupy it rent-free to his widow, but he stipulated that she would be responsible for all expenses and repairs relating to the house. The house needed extensive repairs, which the widow was unable to afford. The will contained no other provision for the widow and the deceased had in fact left a document in which he stated that she had not been a loving and caring wife and had verbally and physically abused him. The court of first instance found that the widow had virtually no earning capacity and that, contrary to the deceased’s contention, she had in fact cared for the deceased when he was ill and throughout the entire marriage. It awarded her a half share in the property rather than the right to occupy

¹⁷⁸⁷ *Re Pugh* [1943] Ch 387; *Campbell v Campbell* [1976] 3 WLR 572 Fam Div; *Foley v Foley* [1981] 3 WLR 284; *Re Krubert* [1996] 3 WLR 959 CA (Civ Div); *Adams v Lewis* [2001] WTLR 493; *Fielden v Cunliffe* [2005] EWCA Civ 1508.

¹⁷⁸⁸ Section 3(2) and (2A). *H v H (Family provision: remarriage)* [1975] 2 WLR 124 Fam Div; *Re Rowlands* [1984] 5 FLR 813 CA (Civ Div).

¹⁷⁸⁹ [1983] Fam Law 18.

¹⁷⁹⁰ [2011] EWCA Civ 900.

the property. The matter was taken on appeal, but the Court of Appeal upheld the decision;

- the provision that the applicant spouse might reasonably have expected to receive if, on the day on which the deceased died, the marriage had been terminated by divorce rather than death.¹⁷⁹¹ This guideline only applies to current (ie not former) spouses and civil partners. Parry and Kerridge¹⁷⁹² refer to this as the “imaginary divorce” guideline. This guideline has been criticised¹⁷⁹³ for ignoring the essential difference between divorce proceedings and family provision proceedings, namely that in the latter one party is deceased and therefore no longer has future needs or earnings. Reed¹⁷⁹⁴ also points out that where a marriage ends in divorce, consideration should be given to the finances of two living parties, whereas in death only one party’s needs have to be considered. The court has a wide discretion in a divorce situation to redistribute the ownership of assets between the spouses in order to make reasonable provision. One example where the court took this into consideration was in *In re Bunning*,¹⁷⁹⁵ where the court calculated the maximum provision the widow would have been entitled to in matrimonial proceedings and then proceeded to award her almost double that amount. Douglas¹⁷⁹⁶ points out that the court’s approach in a divorce has changed in recent years from an award limited to satisfying the reasonable requirements to the satisfaction of need, compensation for relationship-generated disadvantage and sharing of the marital assets.¹⁷⁹⁷ She suggests¹⁷⁹⁸ that this, coupled with the fact that the 1975 Act provides that the provision is not limited to maintenance, appears to reflect the need

¹⁷⁹¹ Section 3(2).

¹⁷⁹² *The law of succession* 202.

¹⁷⁹³ Parry & Kerridge 202.

¹⁷⁹⁴ “Inheritance Act claims after White & Miller” <http://www.familylawweek.co.uk/site.aspx?i=ed548>.

¹⁷⁹⁵ [1984] Ch 480.

¹⁷⁹⁶ 2014 *Oñati Socio-legal series* (online) 4(2) 234.

¹⁷⁹⁷ *White v White* [2001] 1 AC 596; *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24.

¹⁷⁹⁸ 2014 *Oñati Socio-legal series* (online) 4(2) 236.

for a spouse to be given “recognition” in inheritance law. I find it difficult to reconcile the concept of sharing of marital assets on divorce with the provision in the 1975 Act for “reasonable” provision for the spouse or civil partner. The imaginary divorce guideline is not decisive and does not prescribe a minimum and maximum provision for the applicant.¹⁷⁹⁹ In *Kusminow v Barclays Bank*¹⁸⁰⁰ the husband died, leaving a wife and no children. His will provided for his entire estate to devolve on his niece and nephew who were living in poverty in Russia. The wife’s only resource was a retirement pension and a small amount of savings. She applied for reasonable provision under the 1975 Act. The court applied the “divorce test” as provided for in section 3(2) and found that she was in need of reasonable provision, but that the heirs were also in need. The court deemed it reasonable to award slightly less than half of the joint assets of the estate to the wife. In *Re Besterman*¹⁸⁰¹ the deceased left most of his large estate to a university and only a small income to his wife. Referring to the “divorce cross-check”, the court mentioned that in a divorce action the court attempts, as far as it is practicable and just, to put the parties in the same financial position as they would have been had the marriage not broken down. The court emphasised¹⁸⁰² that where the application is for provision under the 1975 Act, the result from the divorce cross-check exercise is merely one factor that the court has regard to – the overriding consideration remains what is reasonable in the circumstances. In *Re Krubert*¹⁸⁰³ the deceased provided in his will that his wife would inherit his personal assets, a small lump sum, and the right to remain in the house owned by him for the rest of her lifetime. The residue of his estate, including the house, was left to trustees with a life interest to his wife. The wife applied for provision under

¹⁷⁹⁹ *Re Bunning* [1984] Ch 480; Parry & Kerridge 202.

¹⁸⁰⁰ [1989] Fam Law 66.

¹⁸⁰¹ [1984] 3 WLR 280 CA.

¹⁸⁰² At 458, 469.

¹⁸⁰³ [1996] 3 WLR 959 CA (Civ Div).

the 1975 Act. The court of first instance ordered that the house and most of the residue go to the wife absolutely, but the Court of Appeal held that, although the “surviving spouse” standard rather than the “maintenance” standard should be applied, the wife had not shown any financial need justifying an absolute interest in the house. It accordingly partly reversed the previous order and ordered that the wife would have a life interest in the house and inherit the rest of the estate absolutely. The court confirmed the approach in *Re Besterman* that the divorce provision is merely one factor to be considered. In *P v G (Family Provision: Relevance of Divorce Provision)*¹⁸⁰⁴ the parties had been married for approximately twenty years when the husband died. He was also survived by two children from his first marriage. The deceased left a will in terms of which he established a number of discretionary trusts from his sizeable estate. The wife brought an application in terms of the 1975 Act. The judge commented that, although the 1975 Act provides that a comparison should be made to the position the survivor would have been in had the marriage been ended by divorce, this comparison was artificial. The court considered what the widow required for a comfortable old age and compared the resultant amount with what the children stood to receive in order to be satisfied that nobody would be prejudiced. In *Fielden v Cunliffe*¹⁸⁰⁵ the deceased died a year after he married Ms Cunliffe, leaving an estate of approximately £1,4 million. The deceased died without children. He left a will that was expressed to be in contemplation of the marriage to Ms Cunliffe (which means that it was not revoked by the marriage),¹⁸⁰⁶ leaving his estate to discretionary trusts for the benefit of Ms Cunliffe, various family members, friends and employees. Ms Cunliffe preferred a definite share of the estate over provision to be decided at the discretion of the trustees and brought a claim under the 1975 Act. The

¹⁸⁰⁴ [2004] EWHC 2944 (Fam).

¹⁸⁰⁵ [2005] EWCA Civ 1508.

¹⁸⁰⁶ Section 18(3) of the Wills Act 1837.

court of first instance awarded a lump sum to her, but the executors of the estate appealed. The Court of Appeal referred to the approach followed when considering claims for financial provision and property adjustment in proceedings between divorced former spouses and held that the correct judicial approach is to apply the statutory provisions to the facts of each case in order to reach a result which is fair and non-discriminatory.¹⁸⁰⁷ The court emphasised that there is a big difference between a marriage that ends as a result of the death of one of the spouses, and a marriage that ends in divorce, as the latter involves a conscious decision by at least one of the parties and results in two living parties who each have their own resources, needs and responsibilities.¹⁸⁰⁸ The principle of freedom of testation on the other hand dictates that a person is free to leave his estate to whomever he pleases, subject only to the statutory obligation to make reasonable financial provision for his widow.¹⁸⁰⁹ The court considered several factors, such as the size of the net estate, Ms Cunliffe's age, the duration of the marriage, Ms Cunliffe's reasonable housing and financial needs and her financial resources. It found that the brevity of the marriage and the fact that Ms Cunliffe's contribution to the family wealth was minimal, supported a departure from an equal division and accordingly awarded just less than half of the estate to her. As Reed¹⁸¹⁰ points out, the message of the case is that where the marriage was of short duration, the courts will be more generous towards the surviving spouse who claims under the 1975 Act than to the divorcing spouse. This seems to suggest that, as it was not the fault of the survivor that the marriage ended, the brevity of the marriage should not be regarded as a negative factor. In *Elizabeth Adams v Julian James Lewis (Administrator of the*

¹⁸⁰⁷ This approach was first adopted in *White v White* [2001] 1 AC 596, a case dealing with divorce.

¹⁸⁰⁸ [2006] 1 FLR 431 at [30].

¹⁸⁰⁹ [2006] 1 FLR 431 at [21].

¹⁸¹⁰ "Inheritance Act claims after White & Miller" <http://www.familylawweek.co.uk/site.aspx?i=ed548> (last accessed 5 January 2017).

Estate of Frank Adams deceased)¹⁸¹¹ the applicant had been married to the deceased for 54 years and they had twelve children. The deceased left the household goods, his personal effects and a small cash legacy to his wife. She contended that this was not reasonable and asked for the family home to be awarded to her. The court agreed that the will did not make reasonable financial provision for her considering the duration of the marriage and the contribution she had made by raising twelve children and looking after the deceased and the family home. It found that, although the amount that a spouse would receive on divorce is one of several factors to consider, it is a very important factor. It accordingly awarded the family home to the applicant but halved her cash legacy. The court mentioned that in a family provision claim, the spouse may get more than would have been the case on divorce, especially where the estate was small. In *Lilleyman v Lilleyman*¹⁸¹² the applicant had been married to the deceased for a little over two years. Both spouses had been married previously, and the deceased had two sons from his earlier marriage. His estate was worth approximately £6 million, the bulk of which comprised shareholdings in three private companies. In his will he left some of his personal belongings to the applicant, as well as the right of occupation of the former matrimonial home and a holiday home, subject to her paying all costs in respect of the matrimonial home and keeping it repaired and insured. He had also set up a small annuity for his wife. The residue of his estate, including the ownership of the aforementioned properties, was left to his sons. The wife's own assets amounted to approximately £400 000 and an income of £11 000 per annum. The wife averred that reasonable provision had not been made for her and asked that a substantial share of the matrimonial home be given to her. The court referred to the two-stage exercise imposed by the 1975 Act¹⁸¹³ and noted

¹⁸¹¹ (2001) WTLR 493 Ch D.

¹⁸¹² [2012] EWHC 821 (Ch).

¹⁸¹³ See 6.2.2.1.

that the first step is to ascertain whether the will made reasonable provision for the applicant. If it is found that it does not, the second step is to determine whether, and to what extent, the court should exercise its powers to grant such provision. The court dealt extensively with the “divorce cross-check” provided for in section 3(2). It mentioned that the fundamental principle is that marriage is recognised as being essentially an equal partnership. On the breakdown of the marriage the division of available property should therefore be conducted on the basis of fairness and non-discrimination, although this does not necessarily mean that the assets should be divided equally. The first goal is to meet the parties’ financial needs. If there are assets left over after this, any prospective economic disparity between the parties that arises from the way in which they had conducted their marriage must be compensated for. This part of the exercise would typically result in the wife being compensated for her role as caregiver. Should there still be property available after this exercise, the court would consider sharing it between the parties, especially if it is matrimonial property or “fruits of the partnership”. Referring to the duration of the marriage, the court held that a short marriage, although as much a partnership of equals as a longer marriage, will have an impact on the *quantum* of the financial fruits of the partnership and will accordingly become relevant when considering the sharing of assets. The court cited with approval the finding in *P v G (Family Provision: Relevance of Divorce Provision)*¹⁸¹⁴ that the divorce cross-check does not impose a floor or ceiling in relation to the available relief under the 1975 Act and is simply one of the factors that must be considered in each particular case. The court then considered the matter at hand and found without hesitation that the will did not make reasonable provision for the applicant. It applied all the factors in the 1975 Act to the facts of the case and found that the applicant’s financial

¹⁸¹⁴ [2004] EWHC 2944 (Fam).

needs amounted to a housing requirement and an income shortfall. It held that an amount of approximately £500 000 would provide her with reasonable financial security, including accommodation, and would reflect a fair application of the divorce cross-check. The fairest way of achieving this would be to transfer the family home, as well as the holiday home or, if she elected, a lump sum representing the agreed market value of the holiday home, to her in addition to the bequests left to her in the will.

- Where the application is made by a person who had during the two years prior to death lived with the deceased as a spouse or civil partner, the court shall consider the same factors as for a spouse, civil partner, former spouse or former civil partner,¹⁸¹⁵ except that the imaginary divorce guideline is not relevant.¹⁸¹⁶ This effectively means that, where the cohabitant and deceased had been cohabitating for a period of two years or more, the cohabitant has an automatic right to claim regardless of whether he or she was financially dependent on the deceased. If the cohabitation period was less than two years, the cohabitant applicant does not have an automatic right and will have to prove that he or she was financially dependent on the deceased. Douglas¹⁸¹⁷ suggests that it is much harder to determine reasonable provision in the context of cohabitants because, although the relationship between the parties was “marriage-like”, the 1975 Act limits the court to considering what is reasonable in the context of maintenance. The Law Commission¹⁸¹⁸ initially indicated that the cohabitant’s claim should not be limited to maintenance but rather that the same criterion should apply as for a spouse or civil partner, ie “such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive, whether or not that

¹⁸¹⁵ Section 3(2A).

¹⁸¹⁶ Parry & Kerridge 207.

¹⁸¹⁷ 2014 *Oñati Socio-legal series* 4(2) 236.

¹⁸¹⁸ *Consultation Paper Intestacy and family provision claims on death* (2009) Law Comm No 191 <http://lawcommission.justice.gov.uk/docs/cp191> Intestacy consultation.pdf (last accessed 3 July 2017).

provision is required for the applicant's maintenance". This proposal was, however, not implemented;¹⁸¹⁹

- Where the application is brought by a person who was being maintained by the deceased, the court shall also have regard to the extent to which, and the basis upon which, the deceased assumed responsibility for the maintenance of the applicant and to the length of time for which the deceased discharged that responsibility.¹⁸²⁰ No minimum period of dependency is prescribed.¹⁸²¹

There is no indication in the 1975 Act that any particular factor in section 3 should be more important and carry a higher weighting than any other factor.¹⁸²² The section simply empowers the court to consider the circumstances of the deceased, the applicant and the other beneficiaries to the estate in order to assess whether the applicant's circumstances should carry more weight than the testator's freedom of testation. A good example of how all the factors in section 3 were considered by the court against the facts of the case can be found in *Re Barron v Woodhead*.¹⁸²³ The court found that the principal concern was the fact that the husband was about to be evicted from the house in which he was living and that he was therefore in need of financial provision. It accordingly ordered that the husband would have a life interest in £100 000, which amount was to be used to purchase a flat or house for him as agreed between the parties to the application. He would be permitted to live there rent free for the rest of his life, but would be responsible for all utilities ("outgoings"). Should the house cost less than £100 000, the balance would be invested to generate income which would be paid to the husband for the rest of his life. The court also awarded a lump sum

¹⁸¹⁹ *Report: Intestacy and family provision claims on death* (2001) Law Com No 331 HC 1674 (online) http://lawcommission.justice.gov.uk/docs/lc331_intestacy_report.pdf (last accessed 3 July 2017).

¹⁸²⁰ Section 3(4).

¹⁸²¹ *Witkowska v Kaminski* [2006] EWCH 1940 (Ch); *Lilleyman v Lilleyman* [2012] EWHC 821 (Ch); Parry & Kerridge 216; Francis "Family provision: what is the problem with the modern 1975 Act disputes?" 2012(75) *Family Law* 1247.

¹⁸²² Douglas 2014(4)2 *Oñati Socio-legal series* (online) 232.

¹⁸²³ [2008] EWHC 810 (Ch).

of £25 000 to the husband to assist him with the costs of moving to this new property and to cover future expenses. I find the order clear and unambiguous and very practical considering the circumstances of the case.

6.2.2.3 Orders the court may make

Once the court has determined that reasonable provision had not been made by the deceased, it must determine what, if any, order it can make to ensure that such reasonable provision is granted to the applicant. An order for provision can only be made out of the net estate of the deceased.¹⁸²⁴

“Net estate” is widely defined.¹⁸²⁵ Some assets or property are always included in the net estate, for example property which the deceased had the power to dispose of in terms of a will, property in respect of which the deceased held a general power of appointment and certain assets earmarked by the deceased to devolve on another person under a statutory nomination or a *donatio mortis causa*. In addition, certain property might be included in the deceased’s net estate if the court orders accordingly.¹⁸²⁶ This includes the deceased’s severable share in property held in joint tenancy.¹⁸²⁷ The court also has the power¹⁸²⁸ to address instances where the deceased during his or her lifetime disposed of property to others and/or decreased the debts and liabilities payable to his or her estate in an attempt to evade a family provision order. In such an instance the court can compel the “donee” to provide money or other property so that financial provision can be made for the applicant. Although the 1975 Act does not place any minimum limit on the value of the net estate, it can generally be accepted

¹⁸²⁴ Section 2.

¹⁸²⁵ Section 25.

¹⁸²⁶ Sections 9, 10, 11, 25.

¹⁸²⁷ *Re Crawford* (1983) 4 FLR 273; *Jessop v Jessop* [1992] 1 FLR 591; *Murphy v Holland (also known as Murphy v Murphy)* [2004] 1 FCR 1; *Dingmar v Dingmar* [2007] Ch 109; *Miller Family Law Week* <http://www.familylawweek.co.uk/site.aspx?i=ed103> (last accessed 20 January 2018).

¹⁸²⁸ Sections 10-13.

that a large estate will translate into more financial provision for the applicant than a small estate would.¹⁸²⁹

The 1975 Act sets out¹⁸³⁰ the powers of the court to make maintenance orders. It provides¹⁸³¹ that, if the court is satisfied that the disposition of the deceased's estate in terms of his or her will or the intestacy law (or a combination thereof) does not provide reasonable financial provision for the applicant, it may make any of the following orders:

- Periodical payments to the applicant out of the net estate of the deceased for such time as specified.¹⁸³² Such an order may provide for:
 - payments of a specified amount;¹⁸³³
 - payments equal to a specified portion of the income of the net estate;¹⁸³⁴
 - payments equal to the income of such part of the net estate as the court directs should be set aside or appropriated for this purpose;¹⁸³⁵
 - any other way to determine the amount of the payments.¹⁸³⁶

The order may specify which part of the net estate shall be set aside to generate the income from which the payment must be made, limited to that part of the net estate as is sufficient, at the date of the order, to produce the income required to make the payment.¹⁸³⁷ Parry and Kerridge¹⁸³⁸ suggest that an order for periodical payments usually provides that the payments will start from the death of the deceased and terminate on the death of the applicant.¹⁸³⁹ The court has the power to vary or discharge an order for periodical payments, to suspend any provision of it temporarily, and to revive the operation of any such

¹⁸²⁹ *Re Inns* [1947] Ch 576; *Re Borthwick (No 2)* [1949] 1 All ER 472 Ch D; *Malone v Harrison* [1979] 1 WLR 1353; *Re Besterman* [1984] 3 WLR 280 CA; Parry & Kerridge 197.

¹⁸³⁰ Section 2.

¹⁸³¹ Section 2(1).

¹⁸³² Section 2(1)(a).

¹⁸³³ Section 2(2)(a).

¹⁸³⁴ Section 2(2)(b).

¹⁸³⁵ Section 2(2)(c).

¹⁸³⁶ Section 2(2); *Re Blanch* [1967] 1 WLR 987.

¹⁸³⁷ Section 2(3).

¹⁸³⁸ *The law of succession* 226.

¹⁸³⁹ See also *Askew v Askew* [1961] 2 All ER 60; *Re Debenham (Deceased)* [1986] 7 FLR 404.

suspended provision.¹⁸⁴⁰ Where an order for periodical payments is granted to a spouse where the marriage is subject to a decree of judicial separation, a civil partner where the civil partnership is subject to a separation order, or a former spouse or former civil partner of the deceased, the order shall cease to have effect when the applicant enters into a subsequent marriage or civil partnership;¹⁸⁴¹

- A lump sum payment.¹⁸⁴² The order may provide that the lump sum be paid in instalments.¹⁸⁴³ In contrast to the power of the court to vary an order for periodical payments in terms of section 2(1)(a), the court may not vary the amount of the lump sum,¹⁸⁴⁴ and its only power is to vary the number of instalments payable, the amount of any instalments and the date on which an instalment becomes payable.¹⁸⁴⁵ As Parry and Kerridge¹⁸⁴⁶ indicate, a lump sum may be the only practical order when dealing with a small estate;
- The transfer to the applicant of certain specified property in the estate of the deceased.¹⁸⁴⁷ Parry and Kerridge¹⁸⁴⁸ suggest that that such an order may be the most appropriate to avoid a situation where an order for a lump sum would necessitate reducing a portion of the estate to cash;¹⁸⁴⁹

¹⁸⁴⁰ Section 6(1).

¹⁸⁴¹ Section 19.

¹⁸⁴² Section 2(1)(b).

¹⁸⁴³ Section 7(1).

¹⁸⁴⁴ Section 7; *Re Besterman* [1984] 3 WLR 280 CA.

¹⁸⁴⁵ Section 7(2).

¹⁸⁴⁶ *The law of succession* 227.

¹⁸⁴⁷ Section 2(1)(c).

¹⁸⁴⁸ *The law of succession* 227.

¹⁸⁴⁹ See also *Hale v Hale* [1975] 2 All ER 1090 CA; *Thompson v Thompson* [[1975] 2 WLR 868 (CA) (Civ Div)]; *Re Christie (deceased)* [1979] Ch 168; Jordaan Unpublished LLD thesis, University of South Africa (1987) 137.

- An order that certain specified property of the estate be settled for the benefit of the applicant;¹⁸⁵⁰
- An order that property of the deceased estate be used to acquire other property specified in the order and that such acquired property be transferred to the applicant or applied for his or her benefit;¹⁸⁵¹
- An order varying the terms of an ante- or post-nuptial settlement made between the parties to a marriage to which the deceased was one of the parties, for the benefit of the surviving spouse, child of the marriage or a person treated as a child of the family in relation to that marriage;¹⁸⁵²
- An order varying any settlement made during the subsistence of a civil partnership of the deceased, or in anticipation of such civil partnership of the deceased, for the benefit of the surviving civil partner, a child of both civil partners, or a person treated as a child of the family in relation to that civil partnership;¹⁸⁵³
- The court may include in any of the aforementioned orders such “consequential and supplemental” provisions as it deems necessary or expedient in order to give effect to the order, or to ensure that the order operates fairly between beneficiaries of the deceased estate.¹⁸⁵⁴ It is specifically provided¹⁸⁵⁵ that the court may order any person who holds property of the net estate of the deceased to make such payment or transfer such property to the applicant.¹⁸⁵⁶

¹⁸⁵⁰ Section 2(1)(d); *Harrington v Gill* [1983] 4 FLR 265; *Hanbury v Hanbury* [1999] 2 FLR 255.

¹⁸⁵¹ Section 2(1)(e).

¹⁸⁵² Section 2(1)(f).

¹⁸⁵³ Section 2(1)(g). This section was inserted by the Civil Partnership Act 2004 with effect from 5 December 2005.

¹⁸⁵⁴ Section 2(4).

¹⁸⁵⁵ Section 2(4)(a).

¹⁸⁵⁶ *Malone v Harrison* [1979] 1 WLR 1353, 1366.

The court may also vary the disposition of the deceased's estate, whether in terms of a will or the law relating to intestacy, or a combination thereof, in such manner as the court thinks fair and reasonable considering the circumstances of the case and the provisions of the order.¹⁸⁵⁷ The court may furthermore confer the powers the court deems necessary or expedient on trustees who hold property that is the subject of an order.¹⁸⁵⁸

An important provision¹⁸⁵⁹ in the 1975 Act allows the court to make an interim order for maintenance where the court is not yet able to determine the order to be made in terms of section 2. In order to qualify for an interim order for maintenance, the court must be satisfied that the applicant is in immediate need of financial assistance,¹⁸⁶⁰ that it is not yet possible to determine what final order (if any) should be made, and that there is property in the estate of the deceased that is, or can be made, available to meet the applicant's needs.¹⁸⁶¹ If the court is so satisfied, it may order the payment of a lump sum or more than one sum at intervals the court deems reasonable.¹⁸⁶² The court may make such order subject to any conditions or restrictions it deems necessary.¹⁸⁶³ When considering the need for an interim order, the court is empowered to consider the same factors under section 3 as it will consider under the application, subject to the urgency of the matter.¹⁸⁶⁴ When the court then later makes an order under section 2, it may provide that any sum paid to the applicant in terms of an interim order shall be treated as having been paid as part of the order under section 2.¹⁸⁶⁵

¹⁸⁵⁷ Section 2(4)(b).

¹⁸⁵⁸ Section 2(4)(c).

¹⁸⁵⁹ Section 5.

¹⁸⁶⁰ Section 5(1)(a).

¹⁸⁶¹ Section 5(1)(b).

¹⁸⁶² Section 5(1); *Re Besterman* [1984] 3 WLR 280 CA; *Stead v Stead* [1985] 6 FLR 16.

¹⁸⁶³ Section 5(1); *Re Ralphs* [1968] 1 WLR 1522.

¹⁸⁶⁴ Section 5(3).

¹⁸⁶⁵ Section 5(4).

6.2.2.4 Time limit for application

An application must be made no later than six months from the date on which a grant of probate or letters of administration for the deceased estate were first taken out.¹⁸⁶⁶ The court does, however, have a wide power to extend this time limit¹⁸⁶⁷ if the applicant can prove that it is just and proper for the court to do so.¹⁸⁶⁸

Where an applicant brings an application to court, there is no specific rule that provides that the personal representative of the estate must preserve the net estate until the outcome of the application is known.¹⁸⁶⁹ This does, of course, make it difficult for the personal representative to establish when payment may be made to the heirs of the estate. Parry and Kerridge¹⁸⁷⁰ suggest that payment may be made if the interested parties consent thereto or, in the absence of consent, if the court gives leave to do so.¹⁸⁷¹

6.2.2.5 Summary

Parry and Kerridge¹⁸⁷² refer to the rising number of family provision disputes in recent years and suggest that it is a result of uncertainty in the family provision system. I agree with their comment¹⁸⁷³ that there is a real need for a system that has clear rules in order to avoid unnecessary litigation and the costs associated with it.

¹⁸⁶⁶ Section 4.

¹⁸⁶⁷ *Re Salmon* [1980] 3 WLR 748 Ch D; *Stock v Brown* [1994] 1 FLR 840; *Berger v Berger* [2013] EWCA Civ 1305.

¹⁸⁶⁸ *Stock v Brown* [1994] 1 FLR 840; *Re C (Deceased: leave to apply for provision)* [1995] 2 FLR 24 (reported as *Re W* [1995] 2 FCR 689); *McNulty v McNulty* [2002] WTLR 737; *Adams v Schofield* [2004] WTLR 1049 CA (Civ Div); *Berger v Berger* [2013] EWCA Civ 1305; *Bhusate v Patel* [2019] EWHC 470 (C); *Cowan v Foreman* [2019] EWHC 349 (Fam).

¹⁸⁶⁹ Parry & Kerridge 188.

¹⁸⁷⁰ *The law of succession* 189.

¹⁸⁷¹ *Re Ralphs* [1968] 1 WLR 1522.

¹⁸⁷² *The law of succession* 223.

¹⁸⁷³ *The law of succession* 223.

6.3 New Zealand

6.3.1 General

New Zealand adheres to the principle of freedom of testation¹⁸⁷⁴ but this freedom is curtailed by certain statutes:

- The Law Reform (Testamentary Promises) Act¹⁸⁷⁵ gives the court the power to compensate an applicant if the deceased failed to fulfil a promise to reward the applicant for service rendered to the deceased;
- The Family Protection Act¹⁸⁷⁶ (hereinafter referred to as the “FPA”) gives the court the discretion to override a deceased person’s will or the rules of intestacy in order to provide for the maintenance and support of family members of the deceased from his or her estate;
- The Property (Relationships) Act¹⁸⁷⁷ (hereinafter referred to as the “PRA”) gives certain categories of persons the right to apply for the division of “relationship property”.
- The Family Proceedings Act¹⁸⁷⁸ provides¹⁸⁷⁹ that a Family Court may order a spouse, civil partner or *de facto* partner, or the personal representative of such spouse or partner, to pay maintenance to the other spouse or partner. The maintenance will usually be by way of a periodical sum for such term as the court finds fit but limited to the life of the other party. The court is also

¹⁸⁷⁴ *Hunter v Hunter* (1987) 8 NSWLR 573; Grainer “Is family protection a question of moral duty?” 1994(24)2 *Victoria University Wellington Law Review* 151; Peart 1996(10)2 *International Journal of Law, Policy and the Family* 105; Peart & Borkowski 2000(12)4 *Child and Family Law Quarterly* 333; Peart “New Zealand’s succession law: subverting reasonable expectations” 2008(37)4 *Common Law World Review* 356; Peart 2010(14.2) *Electronic Journal of Comparative Law* 1.

¹⁸⁷⁵ 1949.

¹⁸⁷⁶ 1955 No 88.

¹⁸⁷⁷ 1976 No 166.

¹⁸⁷⁸ 1980 No 49.

¹⁸⁷⁹ Section 70(2)(a).

empowered to order the payment of a lump sum for this purpose, either instead of, or in addition to, the periodical payments.¹⁸⁸⁰

For purpose of this thesis I will concentrate on the PRA and FPA as these Acts are the most relevant in the context of a maintenance claim by a surviving spouse or partner and serve as comparative model for the South African position. I will also briefly consider the rights of the surviving spouse or partner under the Te Ture Whenua Maori Act 1993.

6.3.2 PRA

The PRA provides for the redistribution of property between parties in a marital-type relationship when the relationship ends.¹⁸⁸¹ It initially applied only when the marriage ended in divorce, while the Matrimonial Property Act¹⁸⁸² applied when the marriage ended in death.¹⁸⁸³ In 2001 the New Zealand Parliament amended the Matrimonial Property Act to extend the redistribution of property to marriages ending in death.¹⁸⁸⁴ Parliament also adopted the Property (Relationships) Amendment Act.¹⁸⁸⁵ This Act repealed the Matrimonial Property Act and inserted a new part¹⁸⁸⁶ into the PRA that applies when a spouse dies.

The purpose of the PRA is described¹⁸⁸⁷ as:

- To reform the law relating to the property of married couples, civil union couples, and couples who live together in a *de facto* relationship;

¹⁸⁸⁰ Section 70(2)(b).

¹⁸⁸¹ Section 1M.

¹⁸⁸² 1963.

¹⁸⁸³ Peart 2008(37)4 *Common Law World Review* 358.

¹⁸⁸⁴ Peart 2008(37)4 *Common Law World Review* 358.

¹⁸⁸⁵ 2001 No 5; Peart 2008(37)4 *Common Law World Review* 358.

¹⁸⁸⁶ Part 8.

¹⁸⁸⁷ Section 1M.

- To recognise the equal contribution of husband and wife to the marriage partnership, of civil union partners to the civil union, and of *de facto* partners to the *de facto* relationship;
- To provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the *de facto* relationship.

The premise of the PRA is that marriage is a partnership and that it is presumed that both spouses contribute equally, albeit it in different ways.¹⁸⁸⁸ Certain principles¹⁸⁸⁹ apply to guide the achievement of the purpose of the FPA, namely that:

- The equal status of men and women must be maintained and enhanced;
- All forms of contribution to the marriage, civil union or *de facto* relationship must be treated equally;
- A just division of relationship property considers the economic advantages or disadvantages to the spouses or partners arising from the marriage, civil union or *de facto* relationship or from the ending of such marriage, civil union or *de facto* relationship;
- Questions arising under the PRA should be dealt with as inexpensively, simply and speedily as is just.

6.3.2.1 Eligible applicants

The PRA applies essentially to married couples, civil union couples and couples who live together in a *de facto* relationship.¹⁸⁹⁰

¹⁸⁸⁸ Long title Matrimonial Property Act 1976; Peart 2008(37)4 *Common Law World Review* 366.

¹⁸⁸⁹ Section 1N.

¹⁸⁹⁰ Section 1M. Civil union partners and *de facto* partners were included by the Property (Relationships) Amendment Act 2005 No 19.

The PRA defines¹⁸⁹¹ a marriage as including a marriage that is void, a marriage that ends by a legal process inside or outside New Zealand while both spouses are alive, or a marriage that ends with the death of one spouse, whether in or outside New Zealand. The terms “husband”, “wife” and “spouse” have a corresponding meaning.¹⁸⁹² A marriage is regarded as having ended if the parties cease to live together as husband and wife, the marriage is dissolved, or one of the parties dies.¹⁸⁹³ The same rules apply to a civil union.¹⁸⁹⁴

A *de facto* partner is defined¹⁸⁹⁵ as a person who has a *de facto* relationship with another person. A *de facto* relationship is defined¹⁸⁹⁶ as a relationship between two persons, whether man and woman, man and man or woman and woman, who are both eighteen years and older, live together as a couple and are not married to, or in a civil union with, one another.¹⁸⁹⁷ The circumstances to be taken into consideration to determine whether two persons live together as a couple are the same as those provided in the FPA.¹⁸⁹⁸ It is interesting to note that the PRA provides¹⁸⁹⁹ that where a marriage or civil union was immediately preceded by a *de facto* relationship between the spouses or civil union partners, such *de facto* relationship must be treated as if it were part of the marriage or civil union. The same rule applies where a civil union is preceded by a marriage and where a marriage was immediately preceded by a civil union.¹⁹⁰⁰ These provisions are important as the application of the PRA differs depending on the length of the marriage or civil union – special rules apply if the marriage or civil union lasted less than three years.¹⁹⁰¹ In the case of *de facto*

¹⁸⁹¹ Section 2A(1).

¹⁸⁹² Section 2A(1).

¹⁸⁹³ Section 2A(2).

¹⁸⁹⁴ Section 2AB.

¹⁸⁹⁵ Section 2C.

¹⁸⁹⁶ Section 2D.

¹⁸⁹⁷ This is the same definition as is used in the FPA.

¹⁸⁹⁸ See 6.3.2.1.

¹⁸⁹⁹ Section 2B; 2BAA.

¹⁹⁰⁰ Section 2BA.

¹⁹⁰¹ Section 1C(2).

relationships, the PRA usually does not apply if the partners have lived together for less than three years, although certain exceptions are made.¹⁹⁰² The general rule is that the couple's property is to be divided equally between them.¹⁹⁰³ The inclusion of *de facto* partnerships, however, opens the possibility of more than one surviving partner. The Family Proceedings Act¹⁹⁰⁴ provides¹⁹⁰⁵ that spouses who want to apply for a divorce must wait two years before they can do so. This opens the possibility of a person dying with a *de facto* partner, but still being legally married. Should this happen, each surviving party may select one of the available options.¹⁹⁰⁶

6.3.2.2 Division of relationship property

The PRA applies to immovable property situated in New Zealand,¹⁹⁰⁷ but not to Maori land.¹⁹⁰⁸

The PRA also applies to movable property in New Zealand, or situated elsewhere if one of the spouses or partners is domiciled in New Zealand at the time of death, at the time of the application, or at the time when the parties entered into an agreement regarding the division of the property.¹⁹⁰⁹

The basis of the PRA as outlined in section 1M is to provide for a just division of "relationship property". This term is exhaustively defined¹⁹¹⁰ in the Act and has the meaning ascribed to it.¹⁹¹¹ It essentially refers to assets produced by, or closely associated with, the relationship, such as:

¹⁹⁰² Section 85(3); Peart 2010(14.2) *Electronic Journal of Comparative Law* 8.

¹⁹⁰³ Section 1C(3).

¹⁹⁰⁴ 1980 No 49.

¹⁹⁰⁵ Section 39.

¹⁹⁰⁶ Peart 2010(14.2) *Electronic Journal of Comparative Law* 9.

¹⁹⁰⁷ Section 7(1).

¹⁹⁰⁸ Section 6. See 3.4 for more details on Maori land.

¹⁹⁰⁹ Section 7(2).

¹⁹¹⁰ Peart 2008(37)4 *Common Law World Review* 367.

¹⁹¹¹ Section 8.

- The family home, regardless of when it was acquired;¹⁹¹²
- Family chattels, regardless of when they were acquired¹⁹¹³ – chattels include household furniture, tools, garden effects, motor vehicles, caravans, boats and even household pets.¹⁹¹⁴ It does not include chattels used solely or primarily for business purposes, money or heirlooms;¹⁹¹⁵
- Property owned jointly or in common in equal shares;¹⁹¹⁶
- All property owned by either party immediately before the marriage, civil union or *de facto* relationship if acquired in contemplation of such marriage, civil union or *de facto* relationship and intended for the common use or common benefit of both parties;¹⁹¹⁷
- Subject to certain exceptions,¹⁹¹⁸ all property acquired by either party after the start of the marriage, civil union or *de facto* relationship – in *Thompson v Thompson*,¹⁹¹⁹ for example, the court held that a restraint of trade payment made to the husband was relationship property;¹⁹²⁰
- Property acquired after the start of the marriage, civil union or *de facto* relationship for the common use or benefit of both parties, if it was acquired out of property owned by either party before the marriage, civil union or *de facto* relationship or out of the proceeds of any disposition of property owned before the marriage, civil union or *de facto* relationship;¹⁹²¹

¹⁹¹² Section 8(1)(a).

¹⁹¹³ Section 8(1)(b).

¹⁹¹⁴ Section 2.

¹⁹¹⁵ Section 2.

¹⁹¹⁶ Section 8(1)(c). New Zealand follows the English doctrine of joint tenancy or tenancy in common. Joint tenants own the asset as a whole. When one of them dies, the other continues to own the asset and it does not form part of the first-dying party's estate. Property held as tenants in common means that each party owns a portion of the asset and their respective shares form part of their estates on death: see Peart 2010(14.2) *Electronic Journal of Comparative Law* 7 fn 37.

¹⁹¹⁷ Section 8(1)(d); *Sloss v Sloss* [1989] 3 NZLR 31; *Brophy v Brophy* (1992) 9 FRNZ 468 (HC).

¹⁹¹⁸ Section 8(1)(e).

¹⁹¹⁹ [2015] NZFLR 150.

¹⁹²⁰ Henaghan & Ballantyne "Recent changes to the division of relationship property in New Zealand: a new way forward" 2015 *International Survey of Family Law* 232-233.

¹⁹²¹ Section 8(1)(ee).

- The portion of a life policy that is attributable to the relationship,¹⁹²² insurance,¹⁹²³ or pension scheme,¹⁹²⁴
- The income and gains from the proceeds of a disposition of, and increase in, the value of the property mentioned above.¹⁹²⁵

Property acquired by way of succession (ie inheritance), survivorship (ie as joint owner of the property) or gift from a third party, or as the beneficiary of a trust settled by a third party is excluded from relationship property,¹⁹²⁶ unless it has become so intermingled with the relationship property that it is impracticable or unreasonable to regard it as separate property.¹⁹²⁷ Property which is not relationship property is regarded as separate property of the spouse or partner and is retained by its owner.¹⁹²⁸ This includes increases in the value of separate property, unless the increase is a result of the application of relationship property or the actions of the non-owner spouse or partner.¹⁹²⁹ Property acquired by one spouse or partner by way of a gift from the other spouse or partner is separate property unless it is used for the benefit of both.¹⁹³⁰

When one party dies, the entire estate and anything acquired by the estate after death is presumed to be relationship property.¹⁹³¹ Anyone who wants to challenge this bears the onus of proving that it is separate property.¹⁹³² There is a view¹⁹³³ that this presumption favours the surviving spouse or partner, because disproving the status of

¹⁹²² Section 8(1)(g).

¹⁹²³ Section 8(1)(h).

¹⁹²⁴ Section 8(1)(i).

¹⁹²⁵ Section 8(1)(l).

¹⁹²⁶ Section 10(1); Peart 2010(14.2) *Electronic Journal of Comparative Law* 8.

¹⁹²⁷ Section 10(2).

¹⁹²⁸ Section 10(2) read with 9(1).

¹⁹²⁹ Section 9A; *Palmer v Palmer* (1981) 5 MPC 116; *Walsh v Walsh* (1984) 1 FRNZ 262; *Nation v Nation* [2005] 3 NZLR 46 (CA); Peart 2010(14.2) *Electronic Journal of Comparative Law* 8.

¹⁹³⁰ Section 10(3).

¹⁹³¹ Sections 81, 82.

¹⁹³² Section 81(2).

¹⁹³³ Peart 2010(14.2) *Electronic Journal of Comparative Law* 8.

the property will depend on knowledge of the details of the assets, which is quite likely known only to the spouse or partner.

Misconduct on the part of either party may affect the division of relationship property if the misconduct was gross and palpable and significantly affected the extent or value of the relationship property.¹⁹³⁴

The parties to any relationship may bypass the application of the PRA by entering into an agreement about the division of their property.¹⁹³⁵ It is interesting to note that the PRA effectively forces parties to obtain independent legal advice before signing an agreement – it provides¹⁹³⁶ that an agreement will be void if this (and some other prerequisites) did not happen.¹⁹³⁷

6.3.2.3 The available options

The basic structure of the PRA as it applies on death is that the surviving spouse, civil partner or *de facto* partner has a choice between two options.¹⁹³⁸ Whichever option is elected takes priority over the rights of beneficiaries in a will or in terms of intestacy and over claims under the FPA or Testamentary Promises Act.¹⁹³⁹ The options are:

- **Option A** is an election for an application under the PRA for division of the relationship property.¹⁹⁴⁰

When the spouse or partner makes a decision in favour of option A, he or she forfeits the right to an inheritance in terms of the will or rules of intestacy.¹⁹⁴¹

¹⁹³⁴ Section 18A.

¹⁹³⁵ Section 21.

¹⁹³⁶ Section 21F.

¹⁹³⁷ See also *Wells v Wells* [2006] NZFLR 870 (HC).

¹⁹³⁸ Section 61.

¹⁹³⁹ Section 78; Peart 2008(37)4 *Common Law World Review* 370; Peart 2010(14.2) *Electronic Journal of Comparative Law* 12.

¹⁹⁴⁰ Section 61(2).

Any bequest in the will to the spouse or partner is treated as having been revoked and the spouse or partner is treated as having predeceased the deceased.¹⁹⁴² The same applies to any entitlement in terms of intestacy under the Administration Act, ie the surviving spouse or partner is treated as having been predeceased.¹⁹⁴³ All of this is, however, subject to the proviso that the will may express a contrary intention or the court may permit the spouse or partner to also take all or some of the bequests in the will or in terms of intestacy if it is satisfied that it is necessary to avoid injustice.¹⁹⁴⁴ According to Peart,¹⁹⁴⁵ anecdotal evidence suggests that few testators provide to the contrary in their wills and forfeiture of the provisions in the will is therefore the norm where option A is chosen.

If option A is selected, the court may make such order regarding the division of relationship property as it deems just.¹⁹⁴⁶ The general rule¹⁹⁴⁷ is that the parties share equally in the family home, family chattels and any other relationship property, but the court may divide the assets according to the contribution each party made to the marriage, civil union or *de facto* relationship if it feels that there are extenuating circumstances that make equal sharing “repugnant to justice”.¹⁹⁴⁸ It appears¹⁹⁴⁹ that it is difficult in practice to satisfy the criteria for this exception, which difficulty is enhanced by the fact that one of the parties to the relationship is deceased.

¹⁹⁴¹ Section 76; Peart 2008(37)4 *Common Law World Review* 370.

¹⁹⁴² Section 76(1); *B v Adams* (2005) 25 FRNZ 778 (FC); *De Muth v Lee* [2005] NZFLR 281 (FC); Peart 2010(14.2) *Electronic Journal of Comparative Law* 9.

¹⁹⁴³ Section 76(3); *B v Adams* (2005) 25 FRNZ 778 (FC).

¹⁹⁴⁴ Section 77; *B v Adams* (2005) 25 FRNZ 778 (FC).

¹⁹⁴⁵ 2010(14.2) *Electronic Journal of Comparative Law* 9.

¹⁹⁴⁶ Section 25(1) read with section 88.

¹⁹⁴⁷ Section 11.

¹⁹⁴⁸ Section 13.

¹⁹⁴⁹ See, for example, *Martin v Martin* [1979] 1 NZLR 97; *Wilson v Wilson* [1991] 1 NZLR 687; *Williams v Williams* [2000] NZFLR 280; *De Malmanche v De Malmanche* [2002] 2 NZLR 838.

Where a *de facto* relationship of short duration ends in death, the surviving *de facto* partner generally has no entitlement under the PRA.¹⁹⁵⁰ “Short duration” is defined¹⁹⁵¹ as having lasted less than three years or where the court deems it just in the circumstances to treat a relationship lasting more than three years as being of short duration. If, however, the court is satisfied that there is a child of the relationship¹⁹⁵² or one of the parties made a substantial contribution to the relationship, and failure to make an order would result in serious injustice,¹⁹⁵³ the court may order the division of the relationship property, but the division will not be equal and will be determined in accordance with the contribution made by each of the partners to the partnership.¹⁹⁵⁴ This is in stark contrast to the position where a marriage or civil union of short duration ends in death, where the relationship property is shared equally, unless the court considers this to be unjust.¹⁹⁵⁵ I interpret this to mean that, even where one spouse or civil partner’s contribution was clearly much greater than the other party’s contribution, the relationship property may still be shared equally. I agree with Peart¹⁹⁵⁶ that the failure to extend the rationale that applies to marriage and civil unions on death (ie that division should be equal unless this would lead to injustice) to *de facto* partners amounts to discrimination against *de facto* relationships.

- **Option B** is an election to not apply under the PRA and to rather receive the inheritance from the deceased’s will or in terms of the rules of intestacy.¹⁹⁵⁷ It is

¹⁹⁵⁰ Section 85(3).

¹⁹⁵¹ Section 2E.

¹⁹⁵² The PRA defines a “child of the *de facto* relationship” widely – it includes any child, whether or not a child of either party, who was a member of the family of the partners at the date of death of one of the partners.

¹⁹⁵³ Section 85(3).

¹⁹⁵⁴ Section 85(4); Peart 2010(14.2) *Electronic Journal of Comparative Law* 6.

¹⁹⁵⁵ Section 85(1) and (2).

¹⁹⁵⁶ 2010(14.2) *Electronic Journal of Comparative Law* 11.

¹⁹⁵⁷ Section 61; *Public Trust v Whyman* [2005] 2 NZLR 696 (CA).

also the default option if the surviving spouse, civil partner or *de facto* partner fails to make an election within the required time frame.¹⁹⁵⁸

If option B is chosen, or where the surviving spouse, civil partner or *de facto* partner is treated as having chosen this option, the PRA essentially does not apply. The surviving spouse or partner retains any assets owned or acquired by survivorship and the estate is distributed in terms of the will of the deceased spouse or partners or in terms of the intestacy rules.¹⁹⁵⁹

It is important to note that the PRA specifically provides¹⁹⁶⁰ that a surviving spouse or partner who brings an application under the PRA is not precluded from also making an application under the FPA.¹⁹⁶¹ This means that a surviving spouse or partner who feels that the entitlement in terms of option A under the PRA is inadequate may pursue an application for further provision under the FPA. The spouse or partner may even choose to bring an application for permission to take the inheritance in terms of the PRA as well as provision from the estate under the FPA.¹⁹⁶² In *B v Adams*¹⁹⁶³ the widow successfully applied for her inheritance and for further provision under the FPA.

As indicated earlier,¹⁹⁶⁴ the inclusion of *de facto* partnerships in the application of the PRA opens the possibility of more than one surviving partner. Each surviving partner will have the choice of the available options.¹⁹⁶⁵ If one party chooses option A and the other

¹⁹⁵⁸ Section 68; *Sanders v Trustees Executor and Agency Co of New Zealand Ltd* (2004) 26 FRNZ 202; *Public Trust v Nicholas* (2005) 24 FRNZ 360.

¹⁹⁵⁹ Section 95. There are a few provisions of the PRA that do apply in such an instance, but they are not relevant for purposes of this thesis.

¹⁹⁶⁰ Section 57.

¹⁹⁶¹ *B v Adams* (2005) 25 FRNZ 778 (FC); *De Muth v Lee* [2005] NZFLR 281 (FC); *EM v SL* [2005] NZFLR 281; Peart 2008(37)4 *Common Law World Review* 370.

¹⁹⁶² Section 77.

¹⁹⁶³ (2005) 25 FRNZ 778.

¹⁹⁶⁴ See 6.3.2.1.

¹⁹⁶⁵ Peart 2010(14.2) *Electronic Journal of Comparative Law* 9.

option B, the process could be relatively straightforward.¹⁹⁶⁶ Where both parties select option A, the relationship property of the successive relationships are divided in chronological order.¹⁹⁶⁷ If the relationships were at some stage contemporaneous, the relationship property claims must as far as possible be settled from the assets attributable to the particular relationship. To the extent that this is not possible, the property must be divided according to the contribution made by each relationship to the acquisition of the property.¹⁹⁶⁸

6.3.2.4 Orders the court may make

Once an election has been made, the choice is irrevocable.¹⁹⁶⁹ The court may, however, under certain circumstances set aside the chosen option if it is satisfied that it would be unjust in all the circumstances to enforce the chosen option.¹⁹⁷⁰ I will not discuss this aspect as it is not relevant to the topic.

As is the case with the accrual system in South Africa, the parties to a relationship may by agreement opt out of the PRA,¹⁹⁷¹ which might leave the surviving spouse or partner without capital on the death of their spouse. The court may set aside an agreement entered into between parties if it is satisfied in all the circumstances that giving effect to it would cause serious injustice.¹⁹⁷² If an agreement is set aside, the ordinary rules of classification and division apply.

¹⁹⁶⁶ See *Chapman as administrator ad colligenda bona of the estate of EP v HP & PN* unreported, High Court Wellington Registry CIV-2007-485-1372, judgment delivered on 2 July 2009, for an example of where the widow elected option A and the partner option B.

¹⁹⁶⁷ Section 52A(2)(a).

¹⁹⁶⁸ Section 52A(2)(b), 52B(2)(b).

¹⁹⁶⁹ Section 67.

¹⁹⁷⁰ Section 69(2)(b); *Sanders v Trustees Executor and Agency Company of New Zealand Ltd* (2004) 26 FRNZ 202.

¹⁹⁷¹ Section 21H.

¹⁹⁷² Section 21J; *Harrison v Harrison* [2005] 2 NZLR 349 (CA). This is similar to the power of the court in South Africa to set aside an antenuptial contract.

In deciding whether serious injustice would be caused, the court must consider the following:¹⁹⁷³

- The provisions of the agreement;
- The length of time since the agreement was made;
- Whether the agreement was unfair or unreasonable at the time it was entered into;
- Whether the terms of the agreement have subsequently become unfair or unreasonable in light of any changes in the circumstances since it was entered into;
- The fact that the parties entered into the agreement to get certainty about the division of their property;
- Any other matters the court deems relevant;
- Whether the estate of the deceased spouse or partner has been wholly or partially distributed.

Prior to 2001, the test for setting aside an agreement was to determine whether it caused injustice. This apparently led to agreements being set aside too easily,¹⁹⁷⁴ which Peart¹⁹⁷⁵ suggests meant that parties could not rely on the agreement, even if they had been properly advised before entering into it.

An interesting provision¹⁹⁷⁶ in the PRA empowers the court to order compensation to a disadvantaged party if the actions or inactions of the personal representative of the estate or of a spouse or partner led to a material devaluing of the relationship property.

The court has the power to redress economic disparity that applies as a result of the division of functions in the marriage or relationship.¹⁹⁷⁷ This provision enables the

¹⁹⁷³ Section 21J (4), (5).

¹⁹⁷⁴ Peart 2010(14.2) *Electronic Journal of Comparative Law* 12.

¹⁹⁷⁵ Peart 2010(14.2) *Electronic Journal of Comparative Law* 12.

¹⁹⁷⁶ Section 18C.

economically disadvantaged spouse or partner who has given up his or her career to support the other partner, to receive a greater share of the relationship property on division.¹⁹⁷⁸ The courts are effectively given an additional discretion to compensate the disadvantaged spouse or partner if there are significant economic disparities in the parties' income and living standards¹⁹⁷⁹ and it is evident that these disparities are likely to come to the fore when the relationship breaks down and the regime of equal sharing cannot address these disparities.¹⁹⁸⁰ The purpose of this section is to place the parties on a more equal footing.¹⁹⁸¹ The applicant must prove not only that significant economic disparity in the income and standard of living is likely to occur, but also that this disparity is the result of the division of duties and functions in the relationship.¹⁹⁸² In assessing any case, the court may have regard to the following factors:¹⁹⁸³

- The likely earning capacity of each party;
- The responsibilities of each party for the ongoing daily care of any minor or dependent child of the relationship;
- Any other relevant circumstances.

The wording of the section seems to suggest that a comparison is to be made between living persons, and this raises the question whether the section can also apply when one of the parties has died. If one takes into consideration the fact that one of the underlying principles of the PRA is for the court to regard the economic advantage or

¹⁹⁷⁷ Section 15.

¹⁹⁷⁸ *M v B* [2006] 3 NZLR 660 (CA); *X v X [Economic disparity]* [2010] 1 NZLR 601; *Jack v Jack* [2014] NZHC 2502; *Williams v Scott* [2015] NZFLR 355; Henaghan & Ballantyne "Recent changes to the division of relationship property in New Zealand: a new way forward" (2015) *International Survey of Family Law* 243.

¹⁹⁷⁹ *Cunningham v Cunningham* Unreported, HC Auckland CIV-2003-404-2392, judgment delivered on 28 November 2003.

¹⁹⁸⁰ Garland "Section 15 Property (Relationships) Act: compensation, substantive equality and empirical realities" 2014(3) *New Zealand Law Review* 358.

¹⁹⁸¹ Garland 2014(3) *New Zealand Law Review* 358.

¹⁹⁸² *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC); *Sullivan v Sullivan* [2002] NZFLR 1037 (FC); *G v G* [2003] NZFLR 289 (FC); *Nation v Nation* [2005] 3 NZLR 46 (CA); *Chong v Speller* [2005] NZFLR 400 (HC); *M v B* [2006] 3 NZLR 660 (CA); *M v M* Unreported, FC Wellington FAM-2007-091-767, judgment delivered on 23 September 2009; *X v X [Economic disparity]* [2010] 1 NZLR 601; Garland 2014(3) *New Zealand Law Review* 359.

¹⁹⁸³ Section 15(2), 15A(2).

disadvantage to the parties arising from their relationship,¹⁹⁸⁴ I would suggest that this principle would be defeated if the provisions of section 15 did not apply on death. Even if that was not the case, I would suggest that the inclusion of “any other relevant circumstances” as a factor that the court may consider to determine if one of the spouses is economically disadvantaged, is probably wide enough to include the death of the other party.

The PRA contains two sections that could be used where relationship property has been disposed of to a trust. Section 44 allows the court to set aside dispositions of relationship property if the applicant seeking relief can prove that the party who put the property into trust had the intention to defraud the applicant.¹⁹⁸⁵ The court can order the person who received the disposition to transfer the property to the applicant, or order that person to pay compensation to the applicant. If it is not possible to order compensation, the court may order the trustees of the trust to pay all or some of the trust income to the disadvantaged party. Section 44C gives the court the power to compel a spouse or partner to disclose information about dispositions of relationship property made to an *inter vivos* trust. If such disposition was made after the marriage or partnership began and it has the effect of defeating the claim or rights of one of the parties, the court can order compensation to that party, which can be satisfied from separate or relationship property. All that needs to be proven is that the trust has the effect of defeating a claim under the PRA – there is no requirement to provide intention to defraud.¹⁹⁸⁶ While the provisions of section 44C apply specifically to dispositions to trusts, the remedies are more limited than those that apply in terms of section 44.¹⁹⁸⁷ The court cannot access the trust assets for purposes of the order.¹⁹⁸⁸ That would mean that the court can, for example, not order the trustees to pay capital of the trust to the

¹⁹⁸⁴ See, for example, section 1N(c).

¹⁹⁸⁵ Henaghan & Ballantyne (2015) *International Survey of Family Law* 235.

¹⁹⁸⁶ *Clayton v Clayton* [2015] NZFLR 233; Henaghan & Ballantyne (2015) *International Survey of Family Law* 237.

¹⁹⁸⁷ Henaghan & Ballantyne (2015) *International Survey of Family Law* 238.

¹⁹⁸⁸ Henaghan & Ballantyne (2015) *International Survey of Family Law* 238.

disadvantaged party, nor can it order the trustees to invest the capital in such a way that it generates income or more income than it already generates. The only power the court has is to order one party to pay a specified amount to the disadvantaged party, or to order one party to transfer property to the disadvantaged party.¹⁹⁸⁹ I am of the view that, despite the limited impact, this is still a useful provision to include in the PRA. In South Africa, there is no similar provision and one spouse can effectively move all his or her assets to a trust in order to thwart a potential claim by the other spouse in terms of the MSSA.

6.3.2.5 Time limit for application

The election has to be made within certain time frames.¹⁹⁹⁰ The size of the estate determines the relevant time frame – if the estate is small, the choice must be made within six months after death or after administration of the estate is granted, whichever is the later.¹⁹⁹¹ A “small estate” is defined¹⁹⁹² as an estate that can lawfully be distributed without the need for administration to be obtained.¹⁹⁹³ In all other cases, the choice must be made no later than six months after administration is granted.¹⁹⁹⁴ The court may extend this period,¹⁹⁹⁵ but only if the application for extension is brought before the final distribution of the estate.¹⁹⁹⁶

I find it interesting that the PRA specifically provides¹⁹⁹⁷ that the administrator of the estate may not distribute the estate before the expiry of six months after administration has been granted or the survivor has chosen an option, whichever occurs first. This provision is clearly designed to ensure that the estate is not distributed within the six

¹⁹⁸⁹ Henaghan & Ballantyne (2015) *International Survey of Family Law* 238.

¹⁹⁹⁰ Section 62.

¹⁹⁹¹ Section 62(1)(a).

¹⁹⁹² Section 2.

¹⁹⁹³ The Administration Act 1969 No 52 determines that some estates can be administered without the need for a grant of administration.

¹⁹⁹⁴ Section 62(1)(b).

¹⁹⁹⁵ Section 62(2).

¹⁹⁹⁶ Section 62(4).

¹⁹⁹⁷ Section 71(1).

months after administration is granted to allow the survivor the option to choose how he or she wishes to proceed. If the survivor, however, consents in writing or the court approves an application, the administrator may distribute the estate within the six-month period.¹⁹⁹⁸ Should this happen, any part of the estate so distributed will not be affected by a subsequent application under the PRA.¹⁹⁹⁹

6.3.2.6 Summary

Peart²⁰⁰⁰ suggests that the election given to spouses and partners under the PRA blurs the distinction between duty and debt as the PRA forces them to choose between their relationship property and their right to inherit. Rights to inherit (succession law) address typical private law duties owed by a deceased to his or her close family members, whereas entitlement to relationship property addresses the debt owed by a spouse or partner to the other spouse or partner based on their respective contributions to the relationship.²⁰⁰¹ To put it differently, “the relationship property entitlement is earned, the inheritance is not”.²⁰⁰² This raises the question why a spouse or partner cannot by right be entitled to both their relationship property and an inheritance.

6.3.3 FPA

The FPA can be traced back to 1900, when it was called the Testator’s Family Maintenance Act 1900.²⁰⁰³ Although not limiting freedom of testation,²⁰⁰⁴ the Act was an attempt to prevent persons, in particular men, from leaving their estates to non-family members, thereby leaving their wives and children destitute.²⁰⁰⁵ It gave the court

¹⁹⁹⁸ Section 71(2).

¹⁹⁹⁹ Section 74.

²⁰⁰⁰ 2010(14.2) *Electronic Journal of Comparative Law* 13.

²⁰⁰¹ 2010(14.2) *Electronic Journal of Comparative Law* 13.

²⁰⁰² Peart 2008(37)4 *Common Law World Review* 372.

²⁰⁰³ Grainer 1994(24)2 *Victoria University Wellington Law Review* 142.

²⁰⁰⁴ Peart “The direction of the Family Provision Act 1955” 1994(1) *New Zealand Recent Law Review* 193.

²⁰⁰⁵ Peart 1994(1) *New Zealand Recent Law Review* 193; Grainer 1994(24)2 *Victoria University Wellington Law Review* 142; Peart 1996(10)2 *International Journal of Law, Policy and the Family* 108; Peart & Borkowski 2000(12)4 *Child and Family Law Quarterly* 335.

the discretion to override the terms of a will if the testator failed to make adequate provision for the proper maintenance and support of his or her wife or husband or children, to ensure that those family members did not become destitute and dependent on the state.²⁰⁰⁶ This Act made New Zealand the first common law country to give the court the discretion to interfere in a testator's wishes if adequate provision was not available from the estate for the maintenance and support of certain family members.²⁰⁰⁷ The Act gave no guidance as to what "adequate provision" was.²⁰⁰⁸ In 1939 the Testator's Family Maintenance Act was amended to also apply to intestate estates.²⁰⁰⁹ It was renamed the FPA on 1 January 1908.

The preamble of the FPA provides that its purpose is to consolidate and amend certain parliamentary enactments relating to claims for maintenance and support out of deceased estates. The basis of the FPA is that the court may in its discretion order such provision as it deems fit out of the deceased estate for an applicant if it finds that inadequate provision is available from the deceased estate for the proper maintenance and support of such applicant as a result of the deceased's will or the intestacy rules.²⁰¹⁰ Peart²⁰¹¹ points out that the original basis of the Act, namely to prevent destitution of dependent family members, has changed over time from an emphasis on maintenance and support to something much more. This provision is however limited to the extent that it is necessary to remedy the breach of the deceased's moral duty to maintain family members.²⁰¹² This concept of "moral duty" has been the topic of many writers'

²⁰⁰⁶ New Zealand Parliamentary Debates 1900, Vol III, cols 503-504; Grainer 1994(24)2 *Victoria University Wellington Law Review* 142; Hammond "Legislation New Zealand style and US style: the case of inheritance law" 2013(30)3 *Thomas M Cooley Law Review* 277.

²⁰⁰⁷ Peart 1994 *New Zealand Law Review* 193; Peart 2010(14.2) *Electronic Journal of Comparative Law* 19.

²⁰⁰⁸ Grainer 1994(24)2 *Victoria University Wellington Law Review* 144.

²⁰⁰⁹ Peart 2010(14.2) *Electronic Journal of Comparative Law* 15.

²⁰¹⁰ Section 4(1).

²⁰¹¹ 2008(37)4 *Common Law World Review* 364.

²⁰¹² *Plimmer v Plimmer* (1906) 9 GLR 10, 24; *Rowe v Lewis* [1907] 26 NZLR 769, 772; *Wylie v Wylie* (2003) 23 FRNZ 156 (CA); Hammond 2013(30)3 *Thomas M Cooley Law Review* 273; Community Law Organisation "Claims by family members under the Family Protection Act" <https://communitylaw.org.nz/community-law-manual/chapter-10-wills/challenges-to-your-will-after->

criticism. The 1900 Act made no mention of this duty.²⁰¹³ The courts developed the concept of “moral duty” which gives them the opportunity to consider ethics and contemporary social attitudes when considering a claim under the FPA.²⁰¹⁴ By the time *In re Allardice: Allardice v Allardice*²⁰¹⁵ was decided, the view that it was the court’s duty to ascertain if the testator breached a moral duty, was firmly in place.²⁰¹⁶

6.3.3.1 Eligible applicants

In terms of the FPA the following persons may apply for maintenance from the deceased estate:

- The spouse or civil union partner;²⁰¹⁷
- A *de facto* partner who was living in a *de facto* relationship with the deceased at the time of his or her death;²⁰¹⁸
- The children of the deceased;²⁰¹⁹
- Grandchildren of the deceased alive at the time of his or her death;²⁰²⁰
- Stepchildren of the deceased who were being maintained wholly or partly by the deceased, or who were legally entitled to be maintained wholly or partly by the deceased immediately before his or her death;²⁰²¹
- A parent of the deceased (but only in certain circumstances).²⁰²²

For purposes of this thesis I will focus only on spouses, civil union partners and *de facto* partners.

[you-die/claims-by-family-members-under-the-family-protection-act/](#) (last accessed 24 November 2019).

²⁰¹³ Grainer 1994(24)2 *Victoria University Wellington Law Review* 144.

²⁰¹⁴ Grainer 1994(24)2 *Victoria University Wellington Law Review* 144.

²⁰¹⁵ [1910] 29 NZLR 959.

²⁰¹⁶ Grainer 1994(24)2 *Victoria University Wellington Law Review* 145.

²⁰¹⁷ Section 3(1)(a). Civil union partners are included in terms of the Relationships (Statutory References) Act 2005 No 3.

²⁰¹⁸ Section 3(1)(aa). *De facto* partners are included in terms of the Family Protection Amendment Act 2001 No 8.

²⁰¹⁹ Section 3(1)(b).

²⁰²⁰ Section 3(1)(c).

²⁰²¹ Section 3(1)(d).

²⁰²² Section 3(1)(e).

The inclusion of *de facto* partners in a *de facto* relationship as a separate category to spouses and civil union partners suggests that these relationships do not have the legal status of a marriage or civil union but are nonetheless entitled to protection. The FPA defines²⁰²³ “*de facto* partner” and “*de facto* relationship” as having the meaning given to it by section 2 of the PRA. The latter Act defines²⁰²⁴ a *de facto* partner in relation to another person as a person who has a *de facto* relationship with the other person. A *de facto* relationship is defined²⁰²⁵ as a relationship between two persons, whether man and woman, man and man or woman and woman, who are both eighteen years or older, live together as a couple, and who are not married to, or in a civil union with, one another. In order to determine whether two people live together as a couple, all the circumstances of the relationship are to be considered, including any of the following which are relevant in a particular case:²⁰²⁶

- The duration of the relationship – this factor is important as the court does not have the power to make an order in terms of the FPA if the relationship was of short duration, as defined in the PRA,²⁰²⁷ unless it is satisfied that there is a child of the *de facto* relationship or that the *de facto* partner made a substantial contribution to the *de facto* relationship and that the failure to make an order would result in serious injustice to the *de facto* partner. It has been said²⁰²⁸ that this last requirement means that the applicant must show that the deceased had a moral duty to provide for the applicant;
- The nature and extent of a common residence;

²⁰²³ Section 2(1).

²⁰²⁴ Section 2C.

²⁰²⁵ Section 2D.

²⁰²⁶ Section 2D(2).

²⁰²⁷ Section 2E of the PRA defines a relationship of short duration as one where the parties lived together for less than three years or where they lived together for three years and longer but the court considers it just in the circumstances to treat the relationship as one of short duration.

²⁰²⁸ Claims under the Family Protection Act 1955 <http://www.communitylaw.org.za/community-law-manual/chapter-18-wills/challenging-a-will?#c5295>; Paul “Family Protection Act 1955” <http://www.wynnwilliams.co.nz/wynnwilliams/media/Articles/Family-Protection-Act-1955.pdf> (last accessed 4 July 2017).

- Whether or not they are or have been in a sexual relationship. This factor is, however, not a prerequisite to establishing a *de facto* relationship;²⁰²⁹
- The degree of financial dependence or interdependence between them, and any arrangements between them for financial support;
- The ownership, use and acquisition of property;
- The degree of mutual commitment to a shared life;
- The care and support of children;
- The performance of household duties;
- The reputation and public aspects of the relationship.

The FPA provides²⁰³⁰ that, when determining whether two persons live together as a couple, it is not necessary to make a finding on any of the abovementioned matters and the court may therefore have regard to such matters and attach such weight to any matter as it deems appropriate in the circumstances of the case.

6.3.3.2 Adequate provision

The FPA refers to “adequate provision” for the “proper maintenance and support” of the applicant, but contains no definition of these concepts, nor are any guidelines provided to assist with determining this.²⁰³¹ As Peart²⁰³² points out, there is no clarity as to what would constitute adequate provision in the context of proper support and maintenance. The earlier cases approached the question from the point of view that the purpose of the Act was to ensure that the maintenance burden fell on the family and not the state. The duty was limited to adequate provision during the lifetime of the applicant.²⁰³³

²⁰²⁹ *Scragg v Scott* [2006] NZFLR 1076 (HC). This case concerned an application under the PRA, but the definition for “*de facto*” partner in the PRA is also used for purposes of the FPA; Sloan 2011(70)3 *The Cambridge Law Journal* 645.

²⁰³⁰ Section 2D(3).

²⁰³¹ Grainer 1994(4)2 *Victoria University Law Review* 144.

²⁰³² 2010(14.2) *Electronic Journal of Comparative Law* 21.

²⁰³³ *In re Rush Rush v Rush* [1901] 20 NZLR 249; *Plimmer v Plimmer* (1906) 9 GLR 10, 24; *In re Allardice: Allardice v Allardice* [1910] 29 NZLR 959; *In re Allen (deceased), Allen v Manchester* [1922] NZLR 218; Peart 1996(10)2 *International Journal of Law, Policy and the Family* 109.

The only semblance of a guideline is contained in section 11, which provides that there is no restriction on the evidence the court may consider when assessing a claim. The court may, for example, accept hearsay evidence.²⁰³⁴ The section does, however, specifically empower the court to take into consideration the deceased's reasons, as far as they are ascertainable, for making the specific dispositions in the will, or for not providing for the applicant. As Grainer²⁰³⁵ points out though, testators often do not provide any explanation for including (or excluding) certain provisions in their wills, therefore I question the practical value of this inclusion in the Act.

It appears²⁰³⁶ that the court will consider the following when assessing a claim under the FPA:

- Whether anything has been left to the applicant;
- The deceased's opinions and wishes;
- The applicant's age, state of health, ability to earn a living and current financial situation;
- The size of the estate;
- The character and conduct of the applicant, including the relationship between the applicant and deceased;²⁰³⁷
- The moral duty of the deceased to provide for others;²⁰³⁸
- Whether any other person has a legal or moral duty to maintain the applicant;
- Any change in the circumstances after the testator's death.

²⁰³⁴ Grainer 1994(24)2 *Victoria University Wellington Law Review* 150 fn 63.

²⁰³⁵ Grainer 1994(24)2 *Victoria University Wellington Law Review* 150.

²⁰³⁶ *In re Harrison (Deceased) Thomson v Harrison* [1962] NZLR 6, 14; Community Law Organisation "Claims by family members under the Family Protection Act" <https://communitylaw.org.nz/community-law-manual/chapter-10-wills/challenges-to-your-will-after-you-die/claims-by-family-members-under-the-family-protection-act/> (last accessed 24 November 2019).

²⁰³⁷ *In re Green (Deceased) Zukerman v Public Trustee* [1951] NZLR 135; *Re Ward (deceased) Drysdale v Ward* [1964] NZLR 929; *Re Muirhead* unreported, High Court Christchurch Registry M307/91, judgment delivered on 30 July 1992; Peart 1994(1) *New Zealand Recent Law Review* 200.

²⁰³⁸ Peart 1994(1) *New Zealand Recent Law Review* 200.

This relative lack of guidance in the FPA has resulted in the current approach where a strong emphasis is placed on the moral duty of the testator.²⁰³⁹ In *Williams v Aucutt*²⁰⁴⁰ the court held that it was “a matter of judgement in all the circumstances of the particular case”. In *Re Leonard*²⁰⁴¹ the court held that “[e]ach case in a sense calls for the making of a value judgement”. Peart²⁰⁴² suggests that practice indicates that this judgement call makes it very difficult for testators to determine whether or not their wishes will withstand a challenge.

Peart and Borkowski²⁰⁴³ suggest that the courts have given a wide interpretation to the phrase “proper maintenance and support”, which has allowed the courts to attach a lot of significance to the family bond. The general approach is that the applicant must show that the deceased had a moral duty to provide for the proper support and maintenance of the applicant, and that he or she had breached such duty, either by not making any provision, or by not making adequate provision.²⁰⁴⁴ The emphasis on the breach of a moral duty indicates a shift from dependence of the applicant on the testator to the existence of a legal maintenance obligation by the testator towards the applicant. An applicant under the FPA will therefore not succeed unless he or she can prove a moral duty that has been breached.²⁰⁴⁵ The applicant’s moral entitlement is determined at the time of the deceased’s death, but the court will take into consideration any subsequent changes when determining the *quantum* of the award.²⁰⁴⁶

²⁰³⁹ Grainer 1994(24)2 *Victoria University Law Review* 145.

²⁰⁴⁰ [2000] 2 NZLR 479.

²⁰⁴¹ [1985] 2 NZLR 88.

²⁰⁴² 2008(37)4 *Common Law World Review* 376; 2010(14.2) *Electronic Journal of Comparative Law* 2.

²⁰⁴³ 2000(12)4 *Child and Family Law Quarterly* 333.

²⁰⁴⁴ Community Law Organisation “Claims by family members under the Family Protection Act” <https://communitylaw.org.nz/community-law-manual/chapter-10-wills/challenges-to-your-will-after-you-die/claims-by-family-members-under-the-family-protection-act/> (last accessed 24 November 2019); Grainer 1994(24)2 *Victoria University Wellington Law Review* 145.

²⁰⁴⁵ Grainer 1994(24)2 *Victoria University Wellington Law Review* 145.

²⁰⁴⁶ *In re McGregor (deceased) McGregor v Beattie* [1961] NZLR 1077; *Re Field* unreported, High Court Auckland Registry M767/91, judgment delivered on 8 April 1992.

The question then arises as to what proper maintenance and support is. According to Paul,²⁰⁴⁷ maintenance has been treated by the court as meaning financial need, whereas support has a wider interpretation and refers to intangibles such as “sustaining, providing comfort, belonging to a family and of having been an important part to the overall life of the deceased”. This approach is evident in *In re Allardice: Allardice v Allardice*,²⁰⁴⁸ *In re Allen (deceased)*, *Allen v Manchester*,²⁰⁴⁹ and *Re Z (deceased)*.²⁰⁵⁰ While I do not intend discussing claims by children of the deceased, it is worth mentioning that the approach for such claims initially was purely dependency-based and it was understood that the Act’s primary objective was to benefit those who would be able to claim maintenance from the testator if he or she was alive.²⁰⁵¹ As a result, claims would usually only succeed if the children were young and financially dependent. Adult children initially could only succeed if they were entitled to support during their parent’s lifetime.²⁰⁵² Over time, though, the courts became more liberal in their approach and adult children could succeed if they could prove that they were unable to support themselves in a style that represented their station in life.²⁰⁵³ This changed in the early 1900s when the courts started focusing on the concept of the moral duty owed by the deceased to the applicant.²⁰⁵⁴ This also impacted the position of the widow as the courts now considered financial need in a broad sense and no longer focused solely on pure

²⁰⁴⁷ “Family Protection Act 1955” <http://www.wynnwilliams.co.nz/wynnwilliams/media/Articles/Family-Protection-Act-1955.pdf>.

²⁰⁴⁸ [1910] 29 NZLR 959.

²⁰⁴⁹ [1922] NZLR 218.

²⁰⁵⁰ [1979] 2 NZLR 495.

²⁰⁵¹ *In re Rush Rush v Rush* [1901] 20 NZLR 249; *Handley v Walker* [1903] 22 NZLR 933; *Wilkinson v Wilkinson* [1904] 24 NZLR 156.

²⁰⁵² *Handley v Walker* [1903] 22 NZLR 932; *Munt v Findlay* [1905] 25 NZLR 488; *Re Green (Deceased)* (1911) 13 GLR 477.

²⁰⁵³ *In re Allardice: Allardice v Allardice* [1910] 29 NZLR 959; *Pulleng v Public Trustee* [1922] NZLR 1022; *In re Wakelin (Deceased) Copeland v Wakelin* [1927] NZLR 846; Peart 1994(1) *New Zealand Recent Law Review* 203; Peart 1996(10)2 *International Journal of Law, Policy and the Family* 110.

²⁰⁵⁴ *In re Allardice: Allardice v Allardice* [1910] 29 NZLR 959; Peart 1994(1) *New Zealand Recent Law Review* 196; Peart 2010(14.2) *Electronic Journal of Comparative Law* 20.

dependence. It meant that widows could receive provision to allow them to continue with the lifestyle they had enjoyed during the marriage.²⁰⁵⁵

Financial need continued to be the prerequisite for claims under the FPA²⁰⁵⁶ until the mid-1970s when the courts started being more liberal in their interpretation of financial need and the type of awards they were prepared to make.²⁰⁵⁷ Capital awards were being made more often²⁰⁵⁸ and the courts were even prepared to award annuities that would continue after the widow remarried.²⁰⁵⁹ Awards were no longer restricted to cover pure maintenance needs for the necessities of life. In *Williams v Aucutt*²⁰⁶⁰ the court stated more than once that it would amend the will only to the extent required to remedy the breach of the testator's moral duty. It held that the test is whether adequate provision has been made for the proper maintenance and support of the applicant. The court further held²⁰⁶¹ that support is a wider concept than maintenance and means "sustaining, providing comfort" as defined in a dictionary. In the context of children, this would include recognition of belonging to the family and having been a part of the overall life of the deceased.²⁰⁶² It therefore is a wider concept than financial provision to meet an economic need and contingencies.²⁰⁶³ In *Wylie v Wylie*²⁰⁶⁴ the court applied this principle also in relation to claims by surviving spouses and partners. If we compare this approach to the way in which South African courts approach the concept of "maintenance", it would appear that the MSSA has a much narrower focus

²⁰⁵⁵ Peart 1994(1) *New Zealand Recent Law Review* 199; Peart 2010(14.2) *Electronic Journal of Comparative Law* 20.

²⁰⁵⁶ Grainer 1994(24)2 *Victoria University Wellington Law Review* 145.

²⁰⁵⁷ *In re Harrison (Deceased) Thomson v Harrison* [1962] NZLR 6; Peart 1996(10)2 *International Journal of Law, Policy and the Family* 110.

²⁰⁵⁸ For example, *Re Wilson (deceased)* [1973] 2 NZLR 359 (CA).

²⁰⁵⁹ *Re Z (deceased)* [1979] 2 NZLR 495.

²⁰⁶⁰ [2000] 2 NZLR 479. This case dealt with a claim by an adult child, but gives a good indication of the approach of the court.

²⁰⁶¹ At 479 par [52].

²⁰⁶² At 479 par [52].

²⁰⁶³ See also *Auckland City Mission v Brown* [2002] 2 NZFLR 650; *Henry v Henry* [2007] NZFLR 640.

²⁰⁶⁴ (2003) 23 FRNZ 156.

and limits the provision to actual maintenance without taking into consideration factors such as the family bond or the need to provide comfort.

Moral and ethical considerations therefore influence the amount of maintenance awarded.²⁰⁶⁵ Seen in this context, support would include a parent recognising his or her child in some way or another in his or her will. Peart²⁰⁶⁶ suggests that the way in which the court had in earlier years interfered with the testator's will, changed the FPA from a provision of maintenance to a system of forced heirship, even though the provision of maintenance was still in the court's discretion. This has led to much criticism and several reviews by the Law Commission,²⁰⁶⁷ especially in relation to adult children who were not in financial need. Although these reviews did not lead to changes in the FPA, three landmark decisions²⁰⁶⁸ followed that reflect the Court of Appeal's move away from a liberal approach to one that is less interfering.²⁰⁶⁹ In all three cases, the Court of Appeal held that a less interventionist approach was required. None of these cases, however, restricted maintenance to the bare necessities of life and, in fact, all the cases reaffirmed the importance of recognition of the family bond. It appears that some cases were decided merely on the basis of a family relationship.²⁰⁷⁰ Although these cases refer specifically to the obligation of a parent towards a child, the underlying premise is the family bond, and I suggest that it is important to note the court's approach, as the same considerations would apply to obligations between spouses and partners. Peart²⁰⁷¹

²⁰⁶⁵ *Pulleng v Public Trustee* [1922] NZLR 1022; *In re Cavanagh* [1930] NZLR 376; *In re Harrison (Deceased) Thomson v Harrison* [1962] NZLR 6; Peart & Borkowski 2000(12)4 *Child and Family Law Quarterly* 336.

²⁰⁶⁶ 2010(14.2) *Electronic Journal of Comparative Law* 20.

²⁰⁶⁷ For example, "Report of the Working group on matrimonial property and family protection (1988)"; Preliminary paper 24 "Succession law: testamentary claims (1996)"; Report 39 "Succession law; a succession (adjustment) Act 1998".

²⁰⁶⁸ *Williams v Aucutt* [2000] 2 NZLR 479; *Auckland City Mission v Brown* [2002] 2 NZLR 650; *Henry v Henry* [2007] NZFLR 640.

²⁰⁶⁹ Peart 2010(14.2) *Electronic Journal of Comparative Law* 21.

²⁰⁷⁰ *Re Beedham* unreported, High Court Dunedin Registry CP A3/83, judgment delivered on 27 February 1990; *Re Owen*; *Owen v Bradley* unreported, High Court Blenheim Registry CP 33/88, judgment delivered on 20 March 1990; *Re Wright* unreported, High Court Rotorua Registry M100/88, judgment delivered on 13 February 1992; *Harrington v Public Trustee* unreported, High Court Dunedin Registry CP 49/91, judgment delivered on 21 August 1992.

²⁰⁷¹ 2010(14.2) *Electronic Journal of Comparative Law* 19.

suggests that the change in the judicial approach to claims under the FPA has enhanced testamentary freedom to some extent as it reverses the expansive approach that had developed towards the end of the twentieth century.

6.3.3.3 Orders the court may make

When making an order, the court may attach such conditions as it deems fit.²⁰⁷² It may also refuse to make an order in favour of any person if it is of the opinion that the person's character or conduct is or has been such as to disentitle him or her to benefit from an order.²⁰⁷³ The court may order the payment of a lump sum or periodical or other payments.²⁰⁷⁴ The court also has the power to order that any amount specified in the order be set aside out of the estate and held in trust as a class fund for the benefit of two or more persons specified in the order.²⁰⁷⁵ The trustee may then at his or her discretion, but subject to the directions given and conditions imposed by the court, apply the income and capital towards the maintenance or education of any one or more of those persons.²⁰⁷⁶

Where the court has ordered periodical payments or the setting aside of an amount as a class fund, it has the power to enquire at any subsequent date whether the person who is intended to receive this benefit is still alive and/or whether he or she is in a position to adequately provide for his or her own maintenance and support or whether the provision in terms of the order is still adequate.²⁰⁷⁷ It may increase or reduce the provision made or discharge, vary or suspend the order, or make any other order it deems just in the circumstances.²⁰⁷⁸

²⁰⁷² Section 5(1).

²⁰⁷³ Section 5(1).

²⁰⁷⁴ Section 5(2).

²⁰⁷⁵ Section 6(1).

²⁰⁷⁶ Section 6(2).

²⁰⁷⁷ Section 12(1).

²⁰⁷⁸ Section 12(1).

6.3.3.4 Time limit for application

The FPA imposes certain time limits on applications.²⁰⁷⁹ An application may only be heard if it is brought before the expiration of twelve months from the date of the grant of administration in the estate.²⁰⁸⁰ If the application is brought on behalf of a person not of full age or mental capacity, this period is extended to two years.²⁰⁸¹ Both these provisions are, however, subject to the proviso that the final distribution of the estate has not yet been made.²⁰⁸² In terms of the Administration Act,²⁰⁸³ which governs the administration of deceased estates, an administrator may distribute the estate six months after the date of grant of probate. This effectively leaves the applicant under the FPA with a limited time frame within which to lodge the claim.

It appears that most claims lodged in terms of the FPA are by the surviving spouse or partner and the children of the deceased.²⁰⁸⁴ Peart²⁰⁸⁵ mentions that the basis for awards by the court as laid down in section 4 has remained substantively unchanged throughout the existence of the FPA, but the way in which the court has approached the discretion given to it, has changed.

6.3.3.5 Summary

The message from these decisions is that the judges should not use the FPA to do what they regard as fair in the circumstances, but should rather interfere only where the applicant has proven that the deceased breached his or her moral duty and failed to

²⁰⁷⁹ Section 9(1).

²⁰⁸⁰ Section 9(2)(b).

²⁰⁸¹ Section 9(2)(a).

²⁰⁸² Community Law Organisation "Claims by family members under the Family Protection Act" <https://communitylaw.org.nz/community-law-manual/chapter-10-wills/challenges-to-your-will-after-you-die/claims-by-family-members-under-the-family-protection-act/> (last accessed 24 November 2019); Paul "Family Protection Act 1955" <http://www.wynnwilliams.co.nz/wynnwilliams/media/Articles/Family-Protection-Act-1955.pdf>.

²⁰⁸³ 1969 No 52.

²⁰⁸⁴ Peart 1994(1) *New Zealand Recent Law Review* 197; Peart 2010(14.2) *Electronic Journal of Comparative Law* 16.

²⁰⁸⁵ 2010(14.2) *Electronic Journal of Comparative Law* 16.

make adequate provision for the proper support and maintenance of the applicant.²⁰⁸⁶ Peart²⁰⁸⁷ suggests that the high number of successful appeals since the *Williams* decision indicates that there is no workable formula. Although the more conservative approach by the courts shows more respect for testamentary freedom, the confusion surrounding its application means that there is no certainty that a testator's wishes will withstand a challenge and it therefore cannot be said that testamentary freedom has been fully restored.²⁰⁸⁸

6.3.4 Te Ture Whenua Maori Act

As mentioned in 6.3.2.2, the PRA does not apply to Maori land. The abovementioned Act defines Maori land as land declared to be held in accordance with Maori custom.²⁰⁸⁹ Generally speaking, Maori land is not owned by individuals, but held by a tribal community with blood connections to the land.²⁰⁹⁰ Maori custom dictates that the property shall remain in the bloodline, which means that a spouse or partner of a person who holds Maori land cannot apply for division of the land under the PRA, and can at most acquire a life interest in the land when the person who held the land, dies. The life interest could be the right to occupy the land or to receive income from the deceased's interest in the land.²⁰⁹¹

These principles have some parallels to the way in which the customary law of succession in South Africa dealt with land. The RCLSA, however, aims to abolish the customary rule of primogeniture in as far as it applies to the law of succession, and I will

²⁰⁸⁶ Paul "Family Provision Act 1955"

<http://www.wynnwilliams.co.nz/wynnwilliams/media/Articles/Family-Protection-Act-1955.pdf>.

²⁰⁸⁷ Peart 2008(37)4 *Common Law World Review* 376; Peart 2010(14.2) *Electronic Journal of Comparative Law* 22.

²⁰⁸⁸ Peart 1996(10)2 *International Journal of Law, Policy and the Family* 117; Peart 2010(14.2) *Electronic Journal of Comparative Law* 22.

²⁰⁸⁹ Section 6.

²⁰⁹⁰ Peart 2010(14.2) *Electronic Journal of Comparative Law* (October 2010) 8.

²⁰⁹¹ Peart 2010(14.2) *Electronic Journal of Comparative Law* (October 2010) 8.

therefore not discuss this aspect in any detail as it is not relevant to the topic of the thesis.

6.4 Conclusion

It is evident from the foregoing discussion that England and New Zealand have had to deal with drastically changing social landscapes in which new forms of family life have to be accommodated. Both countries have introduced provisions to address the changing concept of what constitutes a family and both countries acknowledge that family obligations and commitment must be honoured. Both countries also acknowledge that the law should provide financial support for certain individuals after the death of a family member. This resonates with the approach taken by South African law, although it should be noted that England and New Zealand have recognised these obligations and commitments for much longer than South Africa.

What is different though when compared to the legal position in South Africa, is the way in which England and New Zealand have chosen to address these issues. There are several differences between the English and New Zealand statutes and the MSSA, the major ones in my opinion being:

- The express recognition given in English and New Zealand statutes to a person who was in a life partnership with the deceased;
- The different maintenance standard applied in England to the spouse and civil partner, which could result in financial provision that exceeds what is actually required for maintenance;
- The express inclusion in the English statute of the contribution made by the applicant to the welfare of the deceased's family and the similar provision in the PRA which gives the court the power to redress economic disparity to assist an economically disadvantaged spouse or partner who has given up a career to support the other partner;

- The express inclusion in the English statute of the types of orders that a court may make;
- The defined time limits within which a claim may be brought in England and New Zealand;
- The wide approach taken by New Zealand courts to the concept of maintenance and support;
- The provision in the PRA that relationship property disposed of to a trust may under certain circumstances be taken into account when considering a claim.
- The role played by the court in assessing claims for maintenance or provision

Based on my experience of determining maintenance claims, I submit that the most fundamental difference is that the legislation applicable in England and New Zealand takes the decision as to the entitlement and *quantum* of maintenance of the surviving spouse (as one of the eligible family members) out of the hands of the executor and places the responsibility squarely on the courts. I do acknowledge that, while this undoubtedly makes the role of the executor in the context of maintenance claims much easier than that of the executor in terms of the MSSA, it does add an additional layer of costs to the process. The time limitations allowed for the applications, however, provide certainty to the applicant, the executor and the heirs – something that is sorely lacking from the MSSA.

It appears that the English and New Zealand legislation is quite some way ahead of South Africa when determining the spousal duty of support. The legislation in both countries is much clearer in providing the court (as the responsible decision maker) with the necessary guidelines and criteria in order to make a decision regarding reasonable maintenance for the surviving spouse. As indicated in chapter 4, it seems that reasonable maintenance in South Africa is still construed narrowly to relate to actual financial requirements of the survivor, which is in stark contrast to the concept of support as applied by English and New Zealand courts.

I will investigate the possibility of similar legislation in South Africa, the resultant costs and the practical impact of such legislation on the executor, in the final chapter of this thesis.

CHAPTER 7

THE MSSA IN PRACTICE

7.1 Introduction

Although most of the chapters in this thesis have focused on the provisions of the MSSA and case law pertaining to it, the aim and emphasis of this thesis²⁰⁹² is to determine and analyse how the MSSA is implemented at a practical level. The focus in this chapter is therefore on the way in which the executor deals with maintenance claims in terms of the MSSA.

This thesis was prompted partly by informal discussions over several years with several role players in the administration of deceased estates, which revealed that the handling of a maintenance claim in terms of the MSSA is an area of concern, mainly due to the lack of practical guidance provided by the MSSA, text books and court cases.

This research therefore includes an empirical element of interviews conducted with several categories of persons who are involved in claims by surviving spouses under the MSSA. Most of the interviews were conducted by way of an electronic questionnaire, but some were done by way of personal face-to-face or telephonic interviews. I obtained permission from all the interviewees to disclose their identities and other personal information, and to quote and attribute their observations.

My aim with the questionnaire and interviews was to gauge whether the average estate practitioner feels comfortable that the MSSA provides the executor with the necessary assistance and guidance to consider and decide a maintenance claim lodged against a deceased estate. I therefore approached different role players. In South Africa, I interviewed estates officers, attorneys who have assisted claimants with the lodging of

²⁰⁹² See 1.3 in this regard.

claims, and the Master of the High Court who oversees the administration of deceased estates. I also approached practitioners in New Zealand and England with some questions relating to the relevant legislation²⁰⁹³ applicable in their countries.

7.2 Interviews – participants

7.2.1 Estates officers in South Africa

I designed an electronic survey²⁰⁹⁴ after analysing the MSSA and noting the areas that my own experience and informal discussions with estates officers have indicated as problematic. This survey was sent to estates officers²⁰⁹⁵ involved in the administration of deceased estates to determine the practical difficulties (if any) faced by them when dealing with maintenance claims in terms of the MSSA.

I utilised the website of The Fiduciary Institute of Southern Africa (FISA)²⁰⁹⁶ to identify names and contact details of individuals who are involved in the administration of deceased estates. The members' database on the FISA website is accessible to the general public, but I also advised the chairperson and chief executive officer of my intended use of the database. The estates officers selected are employees of major trust companies, for example Nedgroup Trust (Pty) Limited, Sanlam Trust Limited, Standard Trust Limited, First Trust Limited, ABSA Trust Limited and Sentinel Trust, firms of attorneys, other financial services companies, and individuals who offer administration of estates as a service.

²⁰⁹³ See 6.2.2 and 6.3 for more details on the legislation.

²⁰⁹⁴ I engaged the services of Dr Liezel Korf, www.liezelkorf.co.za (last accessed 21 December 2018), an expert in the field of empirical research and drafting of questionnaires, to assist me with the questions for the interviews/questionnaires. The survey is attached as Appendix A to this thesis.

²⁰⁹⁵ The term "estates officers" is used as a synonym for "executors".

²⁰⁹⁶ <https://www.fisa.net.za> (last accessed 27 April 2019).

The survey was sent to a total of 166 individuals whose profiles reflect that they are involved with deceased estates. 69 of these individuals are employed by major trust companies, while the others are employed by firms of attorneys, accountants or financial institutions, or are self-employed. Of the 166 individuals to whom the survey was sent, 48 responded. Eighteen of these respondents are employed by trust companies, and the balance by smaller financial services institutions, firms of attorneys, or are self-employed. Of the 48 who responded, seven indicated that they either do not administer estates, or have not had any experience of claims under the MSSA. The remaining 41 responded to most of the questions and formed the core sample of the interviews.

I submit that this small sample of respondents probably does not render the results of the survey statistically reliable, but it has provided me with the relevant information to obtain insight in how executors deal with claims under the MSSA.

7.2.2 Attorneys/advisors in South Africa

I conducted interviews with three advisors known to me who have assisted clients (ie surviving spouses) with the lodging of maintenance claims against deceased estates. The purpose of these interviews was to consider the claim from the perspective of the surviving spouse to see whether there are any practical obstacles faced by the spouse when formulating and lodging the claim with the executor of the deceased estate. The reason for this approach is to determine to what extent, if any, the experience of the surviving spouse can inform the guidance required by the executor and, if so, to assess whether there are alternative ways to handle the maintenance claims to the benefit of all parties, namely the executor, the surviving spouse claimant and the residual heirs of the estate.

7.2.3 Master of the High Court

The administration of deceased estates in South Africa is done under the supervision of the Master of the High Court.²⁰⁹⁷ The executor of a deceased estate must lodge the liquidation and distribution account with the Master of the High Court²⁰⁹⁸ and I was therefore hoping to obtain information from the Master of the High Court about the average number of maintenance claims lodged in terms of the MSSA on an annual basis, and the incidence of objections lodged by surviving spouses or heirs of estates where a maintenance claim was lodged and accepted or denied by the executor.

7.2.4 Practitioners in England and New Zealand

In my analysis of the legal position in England and New Zealand it became apparent that the position of the executor in those countries when dealing with maintenance claims against deceased estates is very different from the position of the executor in South Africa. This is mainly because the legislation in those countries provides that the court, and not the executor, considers and determines the claim. While the legislation and court cases appear to contain the necessary guidelines, I wanted to ascertain from practitioners in those jurisdictions whether that is indeed the case or whether there are practical problems which stem from the legislation. I specifically wanted to determine whether the involvement of the courts causes any delays in the administration process and whether the cost of court proceedings is a limiting factor.

I used the website²⁰⁹⁹ of The Society of Estate and Trust Practitioners (STEP), a global professional association for practitioners who specialise in family inheritance and succession planning, to access their members' directory for details of individuals who

²⁰⁹⁷ Abrie *et al* 81.

²⁰⁹⁸ Section 35 of the Estates Act.

²⁰⁹⁹ <https://www.step.org> (last accessed 6 December 2018). The members' directory is accessible to the general public.

deal with contentious estates, estate planning, family law, wills and administration of deceased estates.

I identified 48 practitioners in England whose profiles on the STEP directory reflect that they may deal with the matters referred to above and sent some questions to them. Of the 48 practitioners to whom the questions were sent, two advised that they had no experience of maintenance claims and therefore could not assist. Only two other practitioners responded. While this lack of response means that the answers are not representative of the average practitioner's experience, it does give some insight into the practical process in England.

I identified 29 practitioners in New Zealand whose profiles on the STEP website directory reflect that they may deal with the matters referred to above and sent some questions to them. One recipient advised that she had no experience of maintenance claims and therefore could not assist. Only one recipient responded to some of the questions. I also approached the Ministry of Justice as I was advised by one of the practitioners that they might be able to assist with relevant information.

7.3 Interviews – contents

7.3.1 Estates officers in South Africa

The questions posed to the recipients of the electronic survey and face-to-face interviews were broadly aimed at determining the following aspects:

- Their overall experience in dealing with estates;
- Their experience of dealing with claims under the MSSA;
- Their views regarding the guidance given by the MSSA; and
- Their views on the best way to consider claims under the MSSA.

Most of the questions presented the respondents with three to five possible responses, from which they could choose one option or all applicable options. Some of the questions asked the respondent to indicate on a scale of 1 to 10 how easy or difficult he or she finds it to apply certain aspects of the MSSA. The respondents were also asked to indicate from a list of possible options who they feel is best suited to consider a claim under the MSSA. I will deal with each question separately by indicating the question and the responses.

Number of years administering estates

The purpose of the question was to establish whether the respondents have sufficient experience to inform their responses to the questions and/or comments about the MSSA. The respondents were presented with a few options from which to select their level of experience.

One respondent has less than five years' experience, four have between five and ten years' experience and 36 have more than ten years' experience.

The responses indicate that the pool of respondents has sufficient experience in dealing with estates to be able to give an informed response to the questions.

Number of claims considered under the MSSA

The purpose of the question was to establish whether the respondents have sufficient experience to inform their comments about the MSSA, but also to lead into the next question relating to the regularity with which estates officers have to deal with claims. The respondents were asked to select the number of claims they have considered from a list of different options.

Fifteen respondents have considered less than five claims, nine respondents have considered between five and ten claims and seventeen respondents have considered more than ten claims.

Although, on average, the respondents have considered less than ten claims, this result must be seen in the context of the regularity with which claims are lodged.

The regularity with which claims are lodged

The purpose of the question was to determine how often estates officers deal with claims under the MSSA. The respondents were asked to choose the most appropriate answer from several options.

Three respondents indicated that a claim is lodged in one in every ten estates, two indicated in one in every 20 estates, ten indicated in one in every 30 estates, twelve indicated in one in every 50 estates and twelve respondents indicated that claims are lodged in less than one in every 50 estates.

These responses indicate that the incidence of a claim under the MSSA is not all that high, which probably explains why most of the respondents have considered fewer than ten claims, as is evident from the previous question.

Whether the claim has any impact on the time frame of the administration process

The purpose of the question was to determine the practical impact of a claim on the administration process. The respondents were provided with different options from which to choose the most appropriate answer.

Four respondents indicated that the claim has no impact on the administration process. Five respondents indicated that the process was delayed by up to three months, and 28 indicated that it was delayed by more than three months.

These responses correspond with my experience of dealing with MSSA claims and indicate that the lodging of a claim does have a significant impact on the time it takes to administer a deceased estate.

How the average maintenance claim was settled

The purpose of the question was specifically to determine whether estates officers consider options other than a lump sum payment for settlement of the claim. The respondents were asked to select the relevant response from a range of options.

Most of the respondents indicated that they have settled maintenance claims by way of cash lump sum payments or a combination of cash lump sum payments and transfer of estate assets. Twenty four respondents have settled the claim by a lump sum cash payment only, and thirteen used a combination of a cash payment and transfer of estate assets. Four respondents indicated that they have used a combination of a cash payment and periodic maintenance payable to the claimant, while only one respondent indicated that claims have been settled by way of periodic maintenance to the claimant.

These answers confirm my observation that most claims are settled by way of a cash payment, or by way of a cash payment and transfer of estate assets. This is despite the fact that maintenance claims traditionally are regarded as periodical,²¹⁰⁰ and are supposed to cover the claimant only for a determined period.²¹⁰¹ This issue was addressed in *Oshry v Feldman*²¹⁰² where the court held that, although there are practical and policy concerns in respect of a lump sum award, such an award might in certain circumstances be the most suitable method to settle a claim. I do not dispute that in some instances a lump sum award is appropriate, but would argue that in most cases

²¹⁰⁰ See 4.4.3.

²¹⁰¹ Sonnekus 2010-4 TSAR 820.

²¹⁰² [2011] 1 All SA 124 (SCA).

the spirit of the MSSA requires that the claim be settled by way of ongoing payments until the surviving spouse no longer requires maintenance.

Whether the respondent has ever completely refused a maintenance claim

The purpose of the question was to determine whether executors apply their mind when considering claims.

Eighteen respondents indicated that they have completely refused a claim under the MSSA.

The responses indicate that executors do properly consider the claim and do not simply accept it as a valid claim without investigation.

The reason for refusing the claim

The purpose of the question was to determine the reasons an executor would consider as appropriate to refuse a claim. The respondents were asked to select all appropriate reasons from a list of options.²¹⁰³

Nine respondents indicated that the survivor could not prove inability to provide for his or her own maintenance needs. One respondent did not choose this option but indicated under “Other reasons” that a claim was refused because the survivor inherited from the deceased and received the proceeds of a life assurance policy. In my view, this response is the same as saying the survivor could not prove inability to provide for his or her own means. Six respondents indicated that the survivor could not provide sufficient information about his or her own means and earnings, and three indicated that the estate had insufficient funds to accommodate the claim.²¹⁰⁴ I am of the view that a lack of sufficient funds in the estate (after the claims of creditors have been settled) is not a

²¹⁰³ See 8.2.1.5 for an explanation for the inclusion of a claim by a heterosexual life partner only.

²¹⁰⁴ The reference to “insufficient funds” refers to the available funds after creditors had been settled. The maintenance claim lodged therefore exceeded the balance available after creditors were settled.

reason to reject a claim – if the executor is satisfied that the claim is for reasonable maintenance needs, but the amount claimed exceeds the available funds in the estate (after settlement of creditors' claims), the claim has to be accepted, but at a lower *quantum*. One respondent refused the claim because it was lodged by a heterosexual life partner of the deceased. Four respondents indicated that they had refused claims for other reasons, with one respondent indicating that the refusal was because the claim was not calculated by an actuary. I find this problematic as the MSSA makes no reference to an actuarial calculation being a requirement for a claim.

The responses indicate that executors are giving sufficient consideration to the claims.

Whether the respondent has ever accepted a claim for a lesser amount than claimed

The purpose of this question was to determine whether an executor who is of the view that the amount of the claim is inflated or unrealistic, would accept it at a lower value than lodged, or would simply refuse the claim. The respondents had to choose “yes” or “no” as the answer and could provide additional comments.

Twenty nine respondents indicated that they have accepted a claim for a lesser amount than claimed and nine indicated that they had not.

These responses indicate that most executors properly consider the claim and do not simply reject a claim if they are of the opinion that the amount of the claim is not reasonable.

Whether an objection in terms of section 35(7) of the Estates Act has ever been lodged against a decision made by the respondent

The purpose of the question was to determine the extent to which dissatisfied claimants or heirs pursue their unhappiness by lodging an objection against the liquidation and distribution account framed by the executor.

Sixteen respondents indicated that an objection had been lodged against a decision made by them and 24 indicated it had not.

In my experience of administering estates, objections against estates are not lodged all that often, and I am of the view that these responses reflect that experience.

Whether the respondent has ever entered into an agreement with the surviving spouse and heirs of the estate as envisaged in section 2(3)(d) of the MSSA

The purpose of this question was to determine whether executors make use of the only mechanism for settlement provided by the MSSA.

Twenty six respondents indicated that they had not entered into an agreement, whereas thirteen had entered into an agreement.

I believe that an agreement is a realistic, practical solution to determine the way in which a MSSA claim is settled, but my experience indicates that this happens very rarely, and these responses confirm that view.

The party or parties who initiated or suggested an agreement (if entered into)

The purpose of the question was to determine the extent to which the executor actively suggests an agreement as a settlement option. The respondents were given a list of options to choose from.

It appears that most of the agreements were initiated by the executor – nine respondents indicated this, whereas three indicated that the heirs had initiated it and three indicated that it had been initiated by the spouse and heirs.

These responses confirm my own experience that an agreement is seldom initiated by the spouse and heirs. I have only experienced one instance where the surviving spouse suggested an agreement.

The level of guidance given to the executor by the MSSA to assess the reasonable maintenance needs of the surviving spouse

This question forms the crux of the survey, as it is intended to determine whether the average estates officer feels that the MSSA gives sufficient guidance to enable him or her to consider a claim. The respondents were provided with three options from which they could choose the appropriate responses.

Most of the respondents (30) indicated that the MSSA does give some guidance, but that it is not sufficient. Eight respondents were of the view that the MSSA provided no guidance at all, while three indicated that it gives sufficient guidance.

These responses correspond with my experience of considering claims under the MSSA and reinforce my view that the MSSA in its current format is not appropriate and should be reconsidered.

The nature of the guidance that should be in the MSSA (This question was addressed to those respondents who indicated that the MSSA gave no, or not enough, guidance.)

The purpose of the question was to determine what guidance is required or desired by executors who deal with the MSSA on a practical level. The respondents were provided with three options from which they could choose the appropriate responses.

Seventeen respondents indicated that they require more guidance to determine the survivor's reasonable maintenance needs and seventeen indicated that more guidance was required to determine the survivor's standard of living during the marriage. 34 Respondents indicated that they needed more guidance to determine the survivor's existing and expected means, earning capacity and financial needs and obligations.

These responses confirm my experience that the major concern amongst executors is how to determine the survivor's current financial situation to assess whether the claim is reasonable.

The purpose of the following four questions was to determine which of the factors provided by the MSSA is regarded by executors as the most problematic to consider. Respondents were asked to indicate the level of difficulty on a scale of 1 to 10, with 1 being very difficult and 10 being very easy.

How easy or difficult the respondent finds it to determine the standard of living of the survivor during the subsistence of the marriage

The average was 3.2.

The average response indicates that most respondents find this factor difficult to apply and this confirms my experience.

How easy or difficult the respondent finds it to determine expected means and earning capacity of the survivor

The average was 3.7.

The average response indicates that most respondents find this factor difficult to apply and this confirms my experience.

How easy or difficult the respondent finds it to determine the financial needs and obligations of the survivor

The average was 4.5.

The average response indicates that most respondents find this factor difficult to apply, although it is evidently slightly less problematic than the previous two factors. This confirms my experience.

How easy or difficult the respondent finds it to assess whether certain needs typically claimed for as part of a maintenance claim are reasonable

The average result is reflected next to each item.

- Food and cleaning products – 4.7
- Vehicle maintenance and petrol – 5.1
- Hairdresser – 4.6
- Cosmetics – 4
- Subscriptions to magazines – 4.8
- Subscriptions to DSTV/Showmax/Netflix – 5.7
- Entertainment – 3.9
- Donations – 4.2
- Holiday costs – 3.8
- Telephone and cell phone costs – 5.5
- Garden services, pool services, domestic cleaning services – 5.5
- Gym contract – 5.4

It would appear from these results that the average estates officer finds it more difficult to assess whether amounts claimed by the surviving spouse for “non-necessities” such as cosmetics, entertainment, holidays and donations are reasonable. This confirms my experience, as the executor essentially is forced to make a subjective or moral judgement as to whether such items are reasonable when determining maintenance. It is my contention that this places an unacceptable burden on the executor.

The level of comfort with the responsibility placed on the executor by section 3 of the MSSA to consider “any other factor” when assessing reasonable maintenance needs

The purpose of the question was to determine whether my view that section 3 places an obligation on the executor, without giving him or her guidance for the fulfilment thereof, is correct. The respondents could select “yes” or “no”.

Fifteen respondents indicated that they are comfortable making this assessment, although one of them indicated that this is only because he expects the claim to be calculated by an actuary, from whom he then takes his guidance. Twenty six respondents indicated that they were not comfortable with this responsibility.

These responses resonate to some extent with my own view that most executors would be uncomfortable with the responsibility placed on them by the MSSA.

What the respondent would typically consider as “any other factor” when applying section 3

The purpose of the question was to determine the factors that executors take into consideration. The respondents were provided with four options from which they could select all appropriate responses. The number of respondents who selected the option is reflected next to the relevant option.

- Whether the spouses were living together or were separated at the time of death – 35
- Whether the survivor has family members who can assist him/her – seventeen
- Whether the survivor is the parent of the residual heirs – 23
- The financial situation of the residual heirs – nineteen

I find it interesting that most respondents regard the living arrangements of the spouses as a factor to consider. In my view, this implies that a subjective, moral element is introduced into the consideration. This is contrary to the view of the South African Law Commission²¹⁰⁵ that the basis for maintenance reform should be spouses’ legal duty to support each other, and not the surviving spouse’s moral right to share in the deceased estate. While I understand that the spouses’ living arrangements might be relevant

²¹⁰⁵ *Report Review of the law of succession: the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse* Project 22 Pretoria, 1987.

when determining the extent to which the survivor would require maintenance, I believe a consideration of the survivor's existing means will provide the necessary information and that it is not necessary or relevant to determine whether the spouses were living together at the time of death.

The most appropriate party to consider a maintenance claim

The purpose of the question was to determine whether the respondents are of the view that the executor is best placed to consider the claim, or whether the claim should rather be assessed by the Master of the High Court or a court of law. They were specifically asked to disregard practicalities such as cost and time when considering this question.

Fifteen respondents indicated that they regard the executor as best placed to consider a claim, three indicated that the Master is in the best position and 27 suggested that a court of law is best placed to consider the claim.

In view of the relative lack of practical guidance given by the MSSA, I would agree that a court is best placed to consider a claim under the MSSA, but only if factors such as cost and time are disregarded.

Additional comments

The respondents were invited to add any additional comments they felt appropriate and eleven elected to do so. Their comments range from general remarks about the instances where claims are lodged, to specific comments about the best way in which to consider the claim. The comments can broadly be summarised as follows:

- One respondent²¹⁰⁶ indicated that the lack of guidance in the MSSA results in the acceptance of the claim being left to someone's interpretation of what a normal standard of living should be;

²¹⁰⁶ Patrick Moodley, estates officer Nedgroup Trust (Pty) Ltd, e-mail response 10 October 2018.

- One respondent²¹⁰⁷ commented that the MSSA should not leave “spouse” and “marriage” to the interpretation of the executor and should rather provide guidance regarding which surviving partner is entitled to claim benefits under the Act. The same respondent also suggested that the MSSA is inadequate insofar as it deals with the factors that should be considered when determining the amount of reasonable maintenance. I agree that it would be prudent for the MSSA to be amended to include the definition as amplified by case law;
- Most of the optional comments relate to the fact that an executor does not have enough knowledge and know-how to compute a MSSA claim and that an actuarial calculation should be provided in support of the claim. One respondent²¹⁰⁸ indicated that he leaves it “to the experts (actuary) to assist and if there is then any further dispute I would leave it up to a court of law to give a verdict. I think that takes the onus/responsibility/liability off our shoulders to a large extent”. Another respondent²¹⁰⁹ suggested that a calculation by an actuary is the most practical option, “as they are specialists in taking the relevant factors into account”. One respondent²¹¹⁰ indicated that an MSSA claim would be considered only if there was an actuarial calculation. I note these comments and agree that an actuarial report would provide the executor with a claim that takes into consideration life expectancy and inflation, but I do not agree that an actuarial calculation should be a requirement for a successful claim. The reality is that an actuary calculates the claim based on the instructions provided to him or her. The surviving spouse would therefore typically give the actuary a list of current expenses. The actuary’s role would not be to determine whether the expenses listed are reasonable, but would be limited to doing a calculation of those expenses based on the claimant’s life expectancy and inflation rates. I therefore do not believe that the provision of an actuarial claim absolves the

²¹⁰⁷ Deon Beachen, director ENSAfrica, e-mail response 20 August 2018.

²¹⁰⁸ Andre du Toit, Rubicon Trust Company Limited, e-mail response 20 August 2018.

²¹⁰⁹ Shayne Ramdhani, operational head KZN estates Sanlam Trust, e-mail response 3 September 2018.

²¹¹⁰ Elmien Pols, fiduciary specialist Private Client Holdings, e-mail response 27 August 2018.

executor from the obligation placed on him or her in the MSSA to determine the reasonable maintenance needs of the surviving spouse. The MSSA does not specify the need for an actuarial claim and I submit that an executor cannot refuse to consider a claim if it is not supported by an actuarial calculation.

7.3.2 Attorneys/advisors in South Africa

As indicated above, the reason for soliciting the views of attorneys/advisors was to ascertain how a claim under the MSSA is approached from the perspective of the surviving spouse. While the purpose of this thesis is to examine the position of the executor, there might be valuable information gleaned when considering the position of the surviving spouse.

One advisor²¹¹¹ indicated that he considers several aspects to assist him to determine a reasonable claim:

- He compares the survivor's stated wishes/desires to his or her position during the marriage;
- He considers not what the survivor and his or her deceased spouse had spent during their marriage, but what they realistically could or should have spent based on their means – as he points out, a spendthrift approach should not be encouraged, as it does not reflect reasonableness;
- The emphasis is on the spouse's maintenance needs, and items such as donations to third parties should not be taken into consideration when determining need;
- He takes cognisance of assets outside the marriage, such as an expected inheritance or distribution from a trust.

Once he has agreed with the survivor as to a reasonable amount of maintenance at the time of instituting the claim, he would then refer the matter to the executor to seek

²¹¹¹ Alfred Bester, Legacy FS, personal interview 5 February 2019.

agreement on the amount. If all parties agree, the details would then be provided to an actuary to calculate a claim over the life expectancy of the survivor, using the necessary inflation rates. I find this approach practical and sensible – as pointed out above, the role of the actuary should be limited to calculating the claim over the life expectancy of the claimant spouse. It would therefore be a much fairer outcome if the parties agreed on the reasonable maintenance needs before the actuary did the necessary calculations. The advisor is further of the view that the best solution for settlement of a claim is an agreement between all parties in terms of which an agreed amount is paid to a trust, from which income is paid to the survivor in lieu of maintenance, until his or her death or remarriage, or until his or her circumstances change to the extent that maintenance is no longer required.

One attorney²¹¹² indicated that, in his experience, claims under the MSSA were lodged more frequently where a second marriage was involved, that is, where the surviving spouse was not the biological parent of the deceased's children, who are usually the heirs to the estate. He is of the view that married partners should consider a possible claim under the MSSA while doing planning during their lifetime, but is mindful of the fact that this does not guarantee that the survivor will not lodge a claim when the spouse dies. He regards the "reasonableness" of the claim as the biggest challenge, as he agrees that the question should not be what the survivor and the deceased spent during the marriage, but rather whether their financial circumstances supported such spending habits. He is also of the view that the most practical way of dealing with settlement of the claim is to utilise a trust as this will address practical challenges such as the survivor's circumstances changing to such an extent that it impacts on his or her stated needs. He acknowledges that a trust is not a perfect solution, as it adds a layer of costs,²¹¹³ but under the circumstances it seems to be the best option. He stresses the

²¹¹² Johann Jacobs, Cliffe Dekker Attorneys, personal interview 12 February 2019.

²¹¹³ For example, trustee fees, financial accounting fees and tax return fees.

need for a strong, independent trustee who can make objective decisions when dealing with requests for maintenance.

Another advisor²¹¹⁴ agreed that most claims under the MSSA are lodged where there is a second (or further) marriage and the surviving spouse is not the biological parent or family member of the residual heirs. He indicated that his approach to a claim, whether as executor or as advisor to the surviving spouse, is as follows:

- He obtains details of all income and expenses, with supporting documentation;
- He limits the claim to the survivor's maintenance needs, and items such as donations to third parties will therefore be excluded from the calculation;
- He then considers the spouse's stated maintenance needs against his or her earning capacity, as well as the capacity of the estate to provide for the maintenance needs;
- When he acts as executor, he would at this stage revert to the claimant with further questions to reach a stage where he is satisfied that the maintenance needs have been properly substantiated;
- Once all parties agree on the *quantum* of the maintenance needs, the claim can be calculated over the life expectancy of the surviving spouse, taking inflation into account.

This advisor further indicated that, in his experience, most claims under the MSSA are lodged without due consideration of the provisions and guidelines in the Act. He advised that he has in a few instances had to refuse a claim instituted by a heterosexual life partner of the deceased. In his experience an objection lodged against the maintenance claim as reflected in the executor's liquidation and distribution account seldom proceeds to litigation, possibly because of a lack of funds on the part of the objector.

This advisor indicated that, in his view, periodical maintenance is not a practical solution, as the executor is obliged to finalise the administration of the deceased estate

²¹¹⁴ Brenton Ellis, Servo Fiduciary Services, telephonic interview 26 April 2019.

within a reasonable time frame. His view is that the only viable solution for settlement of a claim is to utilise a trust, as it addresses the practical challenges brought about by a cash lump sum settlement. While the MSSA provides for an agreement, including a trust, to be entered into by the parties, his experience is that parties seldom agree to a trust, as the surviving spouse usually prefers a cash lump sum payment as settlement of the claim.

7.3.3 Master of the High Court

I approached the Acting Chief Master of the High Court, Tessie Bezuidenhout, to determine whether the Master of the High Court keeps records of MSSA claims for statistical purposes. I specifically asked her whether information was available to establish the following:

- The number of maintenance claims lodged on an annual basis;
- The incidence of objections lodged by surviving spouses or heirs where a maintenance claim was accepted or denied by the executor;
- Whether there is any discernible difference in the lodging of claims in the different Master's offices (ie whether claims are more frequently lodged in urban areas than in rural areas).

Ms Bezuidenhout advised²¹¹⁵ that the Master's office does not keep data on maintenance claims, partly because the executor, and not the Master, has to decide the claim. While the Master does have to consider an objection lodged against the liquidation and distribution account, the Master does not keep statistical records of such incidences.

²¹¹⁵ E-mail communication dated 4 January 2019.

7.3.4 Practitioners in England and New Zealand

7.3.4.1 England

The questions posed to the practitioners were designed to obtain information about the practical application of the Inheritance (Provision for Family and Dependants) Act 1975. As the provisions of this Act for dealing with maintenance claims by surviving spouses are so different from the position in South Africa, I focused only on certain aspects and the questions were broadly aimed at determining the following:

- The average time it takes for the courts to hear and decide a claim;
- The average cost of the process;
- Whether periodical payments are favoured over lump sum payments;
- Whether the courts take into consideration assets moved by the deceased to a trust before his or her death.

The advisor²¹¹⁶ who responded could not provide any information on the average time and costs, but he did advise that the estate would usually be liable for the legal costs pertaining to the claim, unless the court deems the claim to be vexatious, in which case the courts may direct that the costs be borne by the claimant.

He further indicated that the courts would regard the types of assets (and their level of liquidity) when determining whether the claim should be settled by way of a lump sum payment or periodical payments. If the court orders periodical payments, the estate cannot be closed as assets have to be held in the estate to make these payments. He indicated that executors will always prefer a capital lump sum payment for practical purposes, but if the assets cannot be realized, periodical payments will have to be funded by other means, for example a bank loan.

²¹¹⁶ John Muirhead, e-mail communication dated 30 January 2019.

The advisor confirmed that the courts are increasingly “looking through” or ignoring attempts by testators to frustrate a claim by a dependant and therefore take cognisance of assets moved by the deceased to a trust before his or her death.

7.3.4.2 New Zealand

The questions posed to the practitioners were designed to obtain information about the practical application of the FPA and PRA. The provisions of these Acts for dealing with maintenance claims by surviving spouses are also very different from the position in South Africa. I therefore limited my focus to certain aspects.

The questions were broadly aimed at determining the following:

- The average time it takes for the courts to hear and decide a claim;
- The average cost of the process;
- Whether periodical payments are favoured over lump sum payments;
- Whether the courts take into consideration assets moved by the deceased to a trust before his or her death (relevant for the PRA only).

One advisor²¹¹⁷ indicated that most FPA claims take two to four years after death to reach a court decision. He estimates that the total legal fees, ie the fees for both parties, would amount to between \$30 000 and \$50 000. In his experience, most claims under the FPA are settled by way of a lump sum payment to avoid ongoing payments which create extra administration into the future.

I also approached the Ministry of Justice Wellington Family Courts Division to ascertain if they could assist with information. Their website²¹¹⁸ indicates that certain information could be obtained by way of an official request for information under the Official

²¹¹⁷ Martin Haanen, Castle Trustees Ltd, e-mail communication dated 30 January 2019.

²¹¹⁸ <https://www.justice.govt.nz/> (last accessed 23 April 2019).

Information Act.²¹¹⁹ I made the necessary application and received an e-mail²¹²⁰ response from the Ministry advising that non-citizens of New Zealand are not entitled to make a request under the Official Information Act, but that they would try to assist via e-mail correspondence. They referred me to the website of the Ministry for information on application fees payable. The Family Court and a High Court both have jurisdiction in respect of proceedings under the FPA,²¹²¹ and the Family Court has jurisdiction over proceedings in terms of the PRA. According to the website,²¹²² an application at the Family Court for an order about relationship property is subject to a fee of \$700. For a hearing about relationship property, the fees are \$906 per half day or part of a half day. According to a written response²¹²³ by the Ministry of Justice, an application under section 4 of the FPA takes an average of 425 working days to be disposed of by the court. Based on a five-day work week, this equates to 85 weeks, or just over 21 months. An application in terms of section 88 of the PRA takes an average of 313 working days to be determined by the court which, using the same assumption, translates into 62 weeks or almost sixteen months.

7.4 Conclusion

It is unfortunate that the Master of the High Court is not able to assist with information regarding MSSA claims, but I do not believe that the information is essential for this thesis and the lack of this information will accordingly not have a negative impact on my research and analysis of the current position as it relates to the executor.

Although the lack of any meaningful response from practitioners in New Zealand and England is disappointing, I remain of the view that this does not detract from the

²¹¹⁹ <https://www.justice.govt.nz/about/official-information-act-requests/> (last accessed 30 January 2019).

²¹²⁰ E-mail dated 13 March 2019 from the Advisor, Official Correspondence, Communication Services, Ministry of Justice.

²¹²¹ Section 3A.

²¹²² www.justice.govt.nz/family/about/fees-and-costs/#fees, last accessed 25 March 2019.

²¹²³ Letter dated 26 April 2019 from Jacquelyn Shannon, Group Manager, Courts and Tribunals, Regional Service Delivery.

findings of this thesis, as the comparative analysis forms only a small part of the thesis. I always envisaged the purpose of the analysis as a tool to see if there are any lessons from the position in England and/or New Zealand that can be of assistance when assessing a solution for the South African position. The analysis does not, however, form a significant part of this thesis and I believe that the discussion of the relevant legislation in those jurisdictions and the case law applicable to the legislation has added the necessary value to this thesis. I therefore do not believe that the lack of responses has any significant bearing on the findings regarding the position of the South African executor. The information provided by the Ministry of Justice in New Zealand is of assistance as it indicates that the legal process provided for in their legislation results in very long delays in the administration of the deceased estate.

The responses received from estates officers and advisors in South Africa have been of significant value and have provided me with the relevant information to gauge how executors deal with claims under the MSSA. The responses have largely confirmed my own experience and views and indicate that reform of the MSSA is required to enable executors to properly deal with maintenance claims. This issue will be addressed in the next chapter.

CHAPTER 8

CONCLUSION AND RECOMMENDED SOLUTION

8.1 Introduction

There can be no doubt that the philosophy behind the MSSA is sound and that its stated objectives,²¹²⁴ namely to provide the survivor with a claim for maintenance against the estate of the deceased spouse in certain circumstances, and to provide for incidental matters, are to be applauded. The MSSA provides a mechanism for a survivor to secure financial relief from the estate of the deceased spouse if the survivor is not able to maintain him- or herself from own resources. The MSSA is therefore particularly useful in those instances where the survivor's inability to maintain him- or herself is exacerbated by the death of the spouse who maintained the survivor during the marriage. It also provides the heirs of an estate with peace of mind that the survivor's claim for maintenance from the estate will not be based on his or her relationship with the deceased, but solely on the extent to which the survivor is factually unable to meet his or her own reasonable maintenance needs. In theory, therefore, the MSSA provides a valid and successful solution to a survivor. The practical application of the MSSA, however, is less successful, as can be seen from the results of the survey in the previous chapter.

At the outset of this thesis²¹²⁵ I indicated that I am of the view that there are certain areas of concern when dealing with the application of the MSSA, namely:

- Practical problems in determining whether the claim by the survivor is reasonable;²¹²⁶
- The lack of a mechanism to deal with settlement of the claim in the most practical manner and the lack of a solution to address the possibility of the

²¹²⁴ As contained in the preamble of the MSSA.

²¹²⁵ See 1.2.

²¹²⁶ At 1.2.1 and 1.2.2.

survivor dying or remarrying before the funds paid to him or her have been consumed or of his or her circumstances changing significantly in any other manner;²¹²⁷

- The application of the MSSA to different relationships.²¹²⁸

The purpose of this research was to investigate and analyse the way in which executors and practitioners approach maintenance claims under the MSSA and the practical difficulties (if any) they experience in considering and dealing with the claims. What follows is a summary of each area of concern and the findings based on my research (where applicable).

8.2 Practical problems faced by the executor

8.2.1 Considering the maintenance claim by the survivor to determine whether it is reasonable

The MSSA²¹²⁹ requires the executor of a deceased estate to determine whether a claim lodged by the survivor is reasonable.

When a marriage in South Africa ends in divorce, the issue of maintenance is either settled by agreement between the parties,²¹³⁰ or by a maintenance order made by the court.²¹³¹ The involvement of the court signifies to me that maintenance is regarded as an important aspect that needs to be given due attention by experts skilled in applying the law to the practical situation. It therefore does not make sense that this onerous responsibility is placed on an executor when the marriage ends in death.²¹³² I submit

²¹²⁷ At 1.2.3 and 1.2.4.

²¹²⁸ At 1.2.5.

²¹²⁹ Section 2(c) of the MSSA read with section 3.

²¹³⁰ Section 7(1) of the Divorce Act.

²¹³¹ Section 7(2) of the Divorce Act.

²¹³² Section 2 of the MSSA.

that there are very few, if any, executors who are as qualified or equipped as the court is to decide on what could probably be regarded a legal question.

As the MSSA places the responsibility of assessing the reasonableness of the survivor's claim for maintenance on the executor, it would be fair to expect that the MSSA would provide the executor with the relevant framework within which to exercise this responsibility, and guidance as to how to fulfil the obligation. As can be seen from the analysis of the MSSA and the responses to the questions posed to executors, this is, however, not the case. The MSSA²¹³³ does list certain factors which the executor must take into consideration when determining the reasonable maintenance needs of the survivor, but it does not prescribe an order of preference for these factors, nor does it guide the executor on how to apply these factors or what weighting (if any) to apply to the factors.²¹³⁴ The executor is therefore forced to make a decision by applying a theoretical list of factors to the circumstances of the survivor, without having sufficient information on the deceased and his or her lifestyle or standard of living. This makes it difficult for the executor to determine whether the survivor's maintenance needs and requirements are reasonable in the context of the deceased estate and the survivor's circumstances.

The executor must consider, assess and form an opinion on factors which relate to the lifestyle the survivor claims to have enjoyed while the deceased was alive, and the lifestyle he or she is expecting to lead. This places an onerous responsibility on the executor. The responsibility of deciding whether the survivor's claimed needs are reasonable to some extent requires the making of a moral judgement as the mere reference to "reasonable" implies subjectivity and the exercise of a discretion. Reasonableness might mean different things to different persons, which means that the executor's assessment is not based on objective criteria. I believe this outcome, where

²¹³³ Section 3 of the MSSA.

²¹³⁴ See 4.4.2 for a more detailed discussion.

the executor forms a subjective opinion on the survivor's requirements, is contrary to the conclusion reached by the Law Commission (now the Law Reform Commission) in its review of the law of succession²¹³⁵ that any factors necessitating a moral decision should be avoided when dealing with the issue of maintenance of the spouse, as the question that should be answered is not whether the survivor has a moral right to share in the estate of the first-dying spouse, but whether he or she has a factual need for support.²¹³⁶ I submit that it is not possible for an executor to assess whether it is reasonable for the survivor to, for example, visit a hairdresser once a week or have an expensive gym contract without forming some kind of moral judgement.

The executor is legally vested with the administration of the deceased's estate.²¹³⁷ He or she represents neither the heirs nor the creditors of the estate,²¹³⁸ and must therefore always act objectively,²¹³⁹ without favouring one party over another. When dealing with any other claim against the deceased estate, the executor will usually be able to rely on supporting evidence such as an agreement between the deceased and the claimant, or an invoice issued by the claimant. The survivor's maintenance claim, on the other hand, is to a large extent based on the "evidence" of the survivor. Anecdotal evidence²¹⁴⁰ seems to indicate that the maintenance claim is often brought in instances where the residual heirs of the estate are the children of the deceased, and the survivor is not the biological parent of the children. There are also instances where the heirs are close family members of the deceased, such as parents or siblings. Due to the nature of the competing claims of the survivor and heirs, it is likely that the parties will disagree as to

²¹³⁵ South African Law Commission *Working Paper 13 Project 22 Review of the law of succession: the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse* 2003.

²¹³⁶ At 28.

²¹³⁷ *Malcomess v Kuhn* 1915 CPD 852; *Clarkson v Gelb* [1981] 1 All SA 93 (W). See 1.2.1 and 2.3 for a more detailed discussion.

²¹³⁸ *Van den Bergh v Coetzee* 201 (4) SA 93 (T); Meyerowitz 12.20. See 1.2.1 and 2.3 for a more detailed discussion.

²¹³⁹ *Reichman v Reichman* 2012 (4) SA 423 (GSJ). See 2.3 for a more detailed discussion.

²¹⁴⁰ Informal discussions with executors and my own observations during the time I dealt with deceased estates.

what constitutes reasonable needs – the survivor will typically want to maximise his or her claim and the heirs will want it to be limited as far as possible so that it does not impact unnecessarily on their inheritance. It is therefore almost inevitable that one of the parties will feel aggrieved by the executor's decision and bring into question the executor's objectivity when assessing the maintenance claim – the heirs might be aggrieved if the executor accepts the survivor's claim, as it reduces the amount available for distribution to them, and the survivor could be aggrieved if the executor rejects his or her claim as being unreasonable, or accepts the claim in a lesser amount.

The MSSA envisages a claim for reasonable maintenance. As maintenance relates to an ongoing requirement, a claim that adequately addresses the needs of the survivor will have to take cognisance of future needs and requirements. This inevitably entails some level of guesswork and assumption. I submit that very few survivors are able to prepare such a claim. In practice,²¹⁴¹ therefore, the survivor usually engages the services of an attorney and/or actuary to accurately calculate the claim taking into account inflation and mortality (or life expectancy) tables. Such an exercise can be costly and time consuming. This exercise, however, is only part of the process – the executor must still consider the claim as presented and decide whether it is reasonable. I submit that few individuals without a legal, financial and/or economical background are able to assess such a claim. Despite having been in the fiduciary industry for 26 years and having dealt with many aspects of succession law and estate planning, I am confident that I do not have sufficient knowledge to assess all aspects of an actuarial claim, and I would suggest that most of my counterparts are in the same position. From my experience of dealing with deceased estates, I have formed the impression that actuarial claims or claims calculated by an attorney are accepted by the executor without too many questions being asked, as it is assumed that the calculations on which the claims are based are accurate. The results of the survey done amongst executors indicate that this

²¹⁴¹ See 1.2.1 fns 48 and 49 for more details regarding the use of inflation and mortality tables.

impression is correct, as several respondents²¹⁴² indicated that they insist on an actuarial claim being lodged or that they will not consider the claim unless an actuarial calculation is provided – this despite the fact that the MSSA makes no provision for such a claim.

There can be no doubt that an actuarial claim will address all aspects of need on the part of the survivor and will accurately allow for future needs taking into account inflation and life expectancy, and should therefore be more accurate than when the spouse him- or herself calculates the claim. I submit, however, that an actuarial claim does not guarantee that the claim is for reasonable maintenance needs as it is not the role of the actuary to question the survivor on his or her lifestyle and spending habits. The actuary's role is to use the information provided by the survivor and apply inflation rates and mortality tables to do a forward projection to determine the claim amount. If the information provided to the actuary is unrealistic or not a true reflection of the survivor's maintenance requirements, the resultant claim will not be a true reflection of the survivor's actual needs. If the executor does not assess the claim and ask questions but merely accept it as presented, there is a real possibility that the survivor will be favoured over the residual heirs of the estate. I believe that there is a solution to this problem – the survivor's reasonable maintenance needs must first be determined and, once an amount has been agreed by the executor and survivor, an actuary can calculate the result over the expected lifetime of the survivor to arrive at the claim that is to be lodged in terms of the MSSA. If this process is not followed and the executor simply accepts the actuarial claim, the executor will not be exercising his or her discretion properly.

The MSSA provides²¹⁴³ that certain factors shall be taken into account when determining the reasonable maintenance needs of the survivor, but no clarification is

²¹⁴² See 7.3.1.

²¹⁴³ Section 3. See 1.2.1 and 4.4.2 for a more detailed discussion.

provided for the rationale behind the inclusion of the factors. There are also no guidelines to indicate how the factors should be applied to the facts of the matter. One such factor is the amount in the deceased estate that is available for distribution to the heirs and legatees.²¹⁴⁴ It is not clear why this factor is included. If it is intended to suggest that the claim should not exceed a certain percentage of the amount available for distribution, this veers dangerously towards the concept of a legitimate portion.²¹⁴⁵ The only assumption I can make is that this factor simply indicates to the executor that the claim cannot exceed the amount available for distribution.

Another factor that is specifically mentioned is the duration of the marriage.²¹⁴⁶ Once again, there is no indication what the executor is supposed to do with this information. Is a survivor of a long marriage automatically regarded in a more favourable light than one of a short marriage? And what is the direct link between the subsistence of the marriage and the reasonable maintenance requirements of the survivor?²¹⁴⁷

As indicated earlier,²¹⁴⁸ the words “in addition to any other factor which should be taken into account” are vague and give the executor no guidance – in fact, I submit that they place an onerous responsibility on the executor, as he or she will have to decide whether a particular factor is something that “should” be considered. The responses from the survey²¹⁴⁹ largely reflect the discomfort felt by estate officers in this regard. It is for this reason that I suggest omitting this phrase from the proposed version of section 3 of the MSSA.²¹⁵⁰

²¹⁴⁴ Section 3(a). See 4.4.2 for a more detailed discussion of this factor.

²¹⁴⁵ See 3.4.3 for a more detailed discussion of the legitimate portion.

²¹⁴⁶ Section 3(b).

²¹⁴⁷ See 4.4.2 for a more detailed discussion regarding the duration of the marriage.

²¹⁴⁸ See 4.4.2.

²¹⁴⁹ See 7.3.1.

²¹⁵⁰ See 8.4.

8.2.2 Payment of interim maintenance until the claim is accepted

The MSSA contains no provision for payment of maintenance to the survivor in the period between the first-dying spouse's death and acceptance of the maintenance claim. My experience of dealing with estates where maintenance claims were lodged indicates that the proof and acceptance of such claims is not a quick process and that it takes some time before the claim is finalised, and this is also reflected in the responses to the survey.²¹⁵¹ A survivor who does not inherit from the deceased or receive any other benefit such as pension funds or the proceeds of life assurance could therefore potentially be without means until the claim is accepted (assuming that it is).

It is evident when assessing the position in England that the legislature anticipated a need for interim maintenance. The 1975 Act allows the court²¹⁵² to make an interim order for maintenance in the period while the court is still considering whether to make an order for maintenance. In order to qualify for an interim order for maintenance, the court must be satisfied that the applicant is in immediate need of financial assistance,²¹⁵³ that it is not yet possible to determine what final order (if any) should be made, and that there is property in the estate of the deceased which is, or can be made, available to meet the applicant's needs.²¹⁵⁴ If the court is so satisfied, it may order the payment of a lump sum, or more than one sum at intervals the court deems reasonable.²¹⁵⁵ The court may make such order subject to any conditions or restrictions it deems necessary.²¹⁵⁶ When considering the need for an interim order, the court is empowered to consider the same factors that it will consider under the application, subject to the urgency of the matter.²¹⁵⁷ When the court later makes an order for

²¹⁵¹ See 7.3.1.

²¹⁵² Section 5.

²¹⁵³ Section 5(1)(a).

²¹⁵⁴ Section 5(1)(b).

²¹⁵⁵ Section 5(1); *Re Besterman* [1984] 3 WLR 280 CA; *Stead v Stead* [1985] 6 FLR 16.

²¹⁵⁶ Section 5(1); *Re Ralphs* [1968] 1 WLR 1522.

²¹⁵⁷ Section 5(3).

maintenance, it may provide that any sum paid to the applicant in terms of an interim order shall be treated as having been paid as part of that later order.

I believe that the lack of provision for interim maintenance is a stumbling block in achieving the objectives of the MSSA. There is no practical sense in providing a framework for the survivor to have a claim for maintenance if he or she is not in a position to fund his or her own maintenance requirements while, for practical considerations, the survivor will receive such maintenance only once the claim has been accepted, which might well be many months after his or her spouse passed away. While I accept that the delay in the estate administration process is not always long, my experience and the responses to the survey indicate that in most instances where a claim under the MSSA is lodged, the estate administration process is delayed. The case law also indicates this. In *Oshry v Feldman*,²¹⁵⁸ for example, the maintenance claim was heard in the Supreme Court of Appeal five years after Mr Feldman died and the survivor received no maintenance from the estate during that time.

8.2.3 Settlement of the claim

The MSSA does not prescribe the way in which the claim is to be settled, essentially leaving it to the executor to decide the most practical settlement method.

The word “maintenance” implies an ongoing, regular commitment.²¹⁵⁹ A deceased estate, however, has a limited lifespan as a combination of different administration processes must be followed to arrive at a point where the creditors’ claims have been settled and the estate assets paid or transferred to the heirs. Therefore, the estate cannot remain “open” or active for an indefinite period. In fact, the Estates Act provides²¹⁶⁰ that the executor must frame and lodge a liquidation and distribution

²¹⁵⁸ [2011] 1 All SA 124 (SCA).

²¹⁵⁹ See 4.4.3 for a more detailed discussion.

²¹⁶⁰ Section 35(5).

account within six months from the date on which Letters of Executorship were issued and pay creditors and heirs within two months after the estate became distributable.²¹⁶¹ These provisions make it clear that the estate cannot remain open indefinitely for the payment of regular maintenance instalments to the survivor. In practice, therefore,²¹⁶² most MSSA claims are settled by way of a lump sum payment to the survivor to enable the executor to finalise the estate and fulfil his or her duties within the defined time frames.

If we assume that most claims are settled by way of a lump sum payment, it should be noted that the nature of the assets in the estate often does not allow for quick and easy settlement of the claim, and executors are often faced with the dilemma of not having sufficient cash in the estate to settle the claim. This necessitates a sale of estate assets to generate the cash needed. The following real-life example illustrates this: A will provides that the deceased's immovable property devolves on his surviving spouse, subject to the condition that it will devolve on his daughters from a previous marriage when the surviving spouse dies. Should the spouse sell the property during her lifetime, the proceeds will devolve on the daughters at the time of the sale. The will further provides that the residue of the estate devolves on the said daughters. On the face of it, there seems to be no problem. The surviving spouse, however, institutes a claim under the MSSA as she has hardly any assets of her own and claims that she cannot maintain the property and herself. The executor accepts her claim as reasonable. The residue of the estate comprises some movable assets and very little cash, resulting in insufficient cash and assets to settle the spouse's maintenance claim. None of the parties are willing or able to enter into an agreement. The executor is therefore forced to sell the immovable property in order to generate sufficient cash to settle the maintenance claim. The net proceeds, after payment of the maintenance claim, devolves on the

²¹⁶¹ Section 35(13).

²¹⁶² See 7.3.1 for more details.

residual heirs (the daughters), leaving the spouse without a roof over her head and the daughters without the hope of eventually inheriting the property.

Nothing precludes the executor from settling the claim by transferring an estate asset to the survivor, rather than paying a cash lump sum to him or her, but this is a viable option only if the nature and value of the assets forming part of the residue of the estate are such that they can be used for this purpose. Where, for example, the deceased held shares or unit trusts, the executor can easily transfer shares or unit trusts that are equal in value to the amount of the maintenance claim. Quite often though, the main asset in the estate is an immovable property which is worth substantially more than the amount of the maintenance claim. This means that the executor will not be able to use the property as a means to settle the maintenance claim. In such a scenario, the only viable option is for the executor to sell the property to generate the required cash.

If any of the parties are unhappy with the claim as accepted by the executor, their only option is to lodge an objection with the Master.²¹⁶³ This process is often unsatisfactory and lengthy, as the Master needs to ensure that all parties are given ample opportunity to represent their case.²¹⁶⁴ The process could take months, with the Master often deciding that the matter is a factual dispute which he or she cannot rule on.²¹⁶⁵ If this happens, the aggrieved party's only option is to proceed to court for an order setting aside the executor's decision,²¹⁶⁶ but this is hardly a practical solution. By this time, many months will have passed since the death of the deceased, which will inevitably impact on the survivor's ability to maintain him- or herself. Furthermore, a survivor who

²¹⁶³ Section 35(7) of the Estates Act.

²¹⁶⁴ Section 35(8) and (9).

²¹⁶⁵ *Boon v Boon* 1947 (1) PH F73; *C P Smaller (Pty) Ltd v The Master* 1977 (3) SA 159 (T); *Broodryk v Die Meester* 1991 (4) SA 365 (O); *Fey and Whiteford v Serfontein* 1993 (2) SA 605 (A); *Ferreira v Die Meester* 2001 (3) SA 365 (O); *Jewaskewitz v Master of the High Court Polekwane* unreported, case number 53514/2012 [2013] ZAGPPHC 118, judgment delivered on 16 May 2013; *LAWSA* vol 31 "Wills and succession" 453.

²¹⁶⁶ Section 35(10).

truly cannot maintain him- or herself will in all probability not have funds to approach the court. It is therefore my contention that in most instances, the survivor will accept the executor's decision, even if not entirely satisfied with it, in an attempt to bring the matter to finality and to receive settlement of the claim (whether partially or in full).

8.2.4 The lack of a mechanism to govern the remaining funds on the death or remarriage of the survivor

Although the MSSA provides that the claim is for reasonable maintenance needs until the death or remarriage of the survivor,²¹⁶⁷ it is usually impossible to anticipate remarriage, and the claim is therefore calculated over the life expectancy of the claimant.²¹⁶⁸ There is no mechanism in the MSSA to address the situation where the survivor dies earlier than anticipated or remarries. This, coupled with the fact that the claim is typically settled by way of a cash lump sum payment and/or the transfer of an estate asset, could have a material impact on the residual heirs. If the survivor dies before the date regarded as the end of his or her life expectancy as indicated in mortality tables, the remaining portion of the funds (if any) or the specific asset will form part of his or her estate and will devolve on his or her testate or intestate heirs. Where the survivor is not the biological parent or close family member of the residual heirs of the first-dying spouse, it is probably unlikely that the survivor will include those residual heirs in his or her own will. If the survivor remarries, any remaining portion of the funds will potentially benefit his or her new spouse. In both instances, the heirs of the first-dying spouse are prejudiced as the funds are not utilised as intended by the MSSA.

The MSSA²¹⁶⁹ gives the executor the power to enter into an agreement with the claimant and heirs who have an interest in the agreement, which includes the creation

²¹⁶⁷ Section 2(1).

²¹⁶⁸ Mortality tables are used for this purpose.

²¹⁶⁹ Section 2(3)(d).

of a trust, but this power is seldom exercised. In my experience the claimant is usually not prepared to enter into such an agreement and would rather receive a cash lump sum or an asset in settlement of his or her claim. This is also borne out by the results of the survey.²¹⁷⁰ The MSSA also allows for an agreement in terms of which the heirs or legatees of the estate agree to take over the obligation to pay maintenance to the survivor but taking on such an obligation may have unfavourable tax consequences for both parties²¹⁷¹ and is seldom applied in practice.

I am not convinced that the settlement of the maintenance claim by way of a lump sum payment or transfer of an asset is in keeping with the objectives of the MSSA and am of the opinion that consideration should be given to the claim being addressed by way of annuity payments rather than payment of a lump sum. In *Feldman v Oshry*²¹⁷² the court referred to the practical difficulty in making periodic payments to the spouse but did not indicate any way to deal with this difficulty. I am of the opinion that the only practical way of doing this would be to make the creation of a trust mandatory. This is discussed further in 8.3.5 below.

The MSSA does not provide for any significant change in the circumstances of the survivor (other than death or remarriage.) The residual heirs of the estate may well be prejudiced if the survivor receives a maintenance payment based on his or her financial situation at the time of the first-dying spouse's death and then receives a windfall such as an inheritance from a third party or winning the lottery. On the opposite side of the coin, the survivor may be prejudiced if he or she lives longer than life expectancy tables indicate, resulting in insufficient funds for his or her maintenance. Once again, I am of the view this can to some extent be addressed if a trust is utilised for settlement of the claim.

²¹⁷⁰ See the relevant question in 7.3.1 for more details.

²¹⁷¹ See 4.4.3 for more details.

²¹⁷² 2009 (6) SA 454 (KZD).

8.2.5 The inconsistent application of the MSSA based on the nature of the relationship between the deceased and survivor

The MSSA applies to the survivor of a marriage.²¹⁷³

A “survivor” is defined²¹⁷⁴ as being the surviving spouse in a marriage dissolved by death, and includes a wife in a customary marriage which was dissolved by a civil marriage contracted by her customary marriage husband with another woman on or after 1 January 1929 but before 2 December 1988.²¹⁷⁵ Although the words “spouse” and “marriage” are not defined, most marital-type relationships in South Africa enjoy protection in terms of the MSSA, even where those relationships do not enjoy legal recognition.²¹⁷⁶ The following persons therefore also qualify as spouses for purposes of the MSSA:

- Civil union partners – this is because a civil union has the same consequences as a civil marriage;²¹⁷⁷
- Parties in a customary marriage entered into after 15 November 2000 which complies with the requirements of the RCMA – these customary marriages are for all purposes recognised as a marriage;²¹⁷⁸
- The survivor of a monogamous Muslim marriage – this is as a result of case law;²¹⁷⁹
- The survivor of a *de facto* polygynous Muslim marriage – this is also as a result of case law.²¹⁸⁰ From a legal perspective, there is no constitutionally acceptable

²¹⁷³ Section 2(1).

²¹⁷⁴ Section 1.

²¹⁷⁵ This definition has applied since 20 September 2010 when section 8 of the RCLSA replaced the previous definition of “the surviving spouse in a marriage dissolved by death”.

²¹⁷⁶ See 5.2 for a detailed discussion of religious marriages and 5.3 for a detailed discussion of life partnerships.

²¹⁷⁷ Section 13 of the CUA.

²¹⁷⁸ Section 2(2) of the RCMA.

²¹⁷⁹ *Daniels v Campbell* 2004 (5) SA 331 (C).

²¹⁸⁰ *Hassam v Jacobs* 2009 (5) SA 572 (CC).

reason to distinguish between Muslim and Hindu marriages,²¹⁸¹ and it therefore follows that our courts will in all likelihood afford a Hindu marriage the same recognition and protection as it does a Muslim marriage;²¹⁸²

- Certain “discarded” wives of customary marriages dissolved by the later civil marriage of the husband qualify for a maintenance claim – provided for in the MSSA;²¹⁸³

Despite the generous extension of the protection of the MSSA to almost all marital-type relationships, our courts have, to date, refused to extend the protection to heterosexual life partners who do not marry or enter into a civil union.²¹⁸⁴ Whilst there is a view that the decision in *Gory* meant that life partners in a same-sex relationship continued to qualify as spouses for purposes of the MSSA,²¹⁸⁵ it appears that this uncertainty has been settled by the recent judgment in *Duplan*. What does remain evident though is that heterosexual and same-sex life partners are not treated the same for purposes of the MSSA as they are for purposes of the ISA.²¹⁸⁶ In the constitutional era we live in, there is no justification for this apparent different treatment, and I predict that it is merely a question of time until the Constitutional Court is approached in this regard. Until this happens or the legislator amends the MSSA to specifically include life partners, the executor needs to be aware that he or she cannot entertain a claim under the MSSA brought by a life partner.

I believe that I have in this thesis provided sufficient evidence that the research substantiates my view that the abovementioned aspects are indeed areas of concern. Although the sample size for the survey was not large, it is evident that most executors who were surveyed agree that these areas must be addressed. It needs to be noted that

²¹⁸¹ Heaton *South African Family Law* 237; Skelton & Carnelley (2010) 202.

²¹⁸² See, for example, *Govender v Ragavayah* 2009 (3) SA 378 (D).

²¹⁸³ Section 1.

²¹⁸⁴ *Volks v Robinson* 2005 (5) BCLR 446 (CC).

²¹⁸⁵ See 5.3.2.1.2 for a discussion of *Gory v Kolver* and 5.3.3 for a detailed discussion of this topic.

²¹⁸⁶ See 5.3.3 for a detailed discussion.

the questionnaire²¹⁸⁷ sent to the survey group was drafted and distributed before I had the opportunity to consider the views of Smith²¹⁸⁸ regarding the impact of the *Duplan* case on the *Volks* decision in the context of ISA claims. This explains why the questionnaire refers only to a claim by a *heterosexual* life partner as a reason for the executor refusing the claim.²¹⁸⁹ I have since reached fresh insights into the more likely legal position of life partners and this is reflected in the gender-neutral provision in my suggested version of section 1 of the MSSA.

8.3 Possible solutions

While there appears to be more than sufficient material in textbooks, academic journals and case law on the theoretical and technical aspects of the MSSA, there is almost no material on its practical implementation. The survey and interviews with South African executors and practitioners indicate that their general view is that the MSSA itself gives insufficient guidance to executors. This, coupled with the lack of material and case law, means that practitioners find it difficult to apply the MSSA when assessing a claim for maintenance.

The aim of my research was firstly to analyse the practical implementation of the MSSA and the challenges faced by the executor when applying its provisions. The second objective of the research was to investigate possible solutions to these challenges and specifically whether there are viable alternative arrangements for the handling of a maintenance claim.²¹⁹⁰ During the course of my research, I have concluded that there are a few possible solutions. These solutions aim to address different aspects of the practical challenges facing the executor. However, they are similar in one respect and that is that they all entail an amendment to the MSSA. I believe some solutions are

²¹⁸⁷ See Appendix A.

²¹⁸⁸ 2018(81)1 *THRHR* 149.

²¹⁸⁹ I should add that none of the recipients commented on this aspect or indicated that they had refused a claim by a same-sex partner, which I submit shows that there is some uncertainty about the legal position of same-sex partners.

²¹⁹⁰ See 1.3 for more details.

more practical and I will discuss them in the order that I perceive to be from the least to the most practical and viable.²¹⁹¹

8.3.1 Providing detailed guidelines in the MSSA for determination of the claim

The purpose of this solution is to keep the *status quo* by placing the obligation to decide the claim on the executor, but to give him or her detailed guidelines that will enable an objective assessment of the claim.

The benefit of introducing guidelines into the MSSA is that it requires minimal change to the MSSA. A further benefit is that it will make the role of the executor easier, as he or she will be able to assess the claim against a list of requirements to reach an understanding of whether the claim is reasonable. It will therefore theoretically avoid a situation where the executor has to make a moral judgement when considering the survivor's claim.

From a purely objective point of view, guidelines will allow the executor to assess a maintenance claim by simply considering the facts or details of the claim against a "checklist". In practice though, the reality is that each maintenance claim will be different as the specific survivor's circumstances, as well as those of the estate and the heirs, will be different. As it is simply not possible to provide guidelines for all potential scenarios and circumstances, it is very likely that the executor will have to deal with certain aspects of a claim for which there are no guidelines.

Even if it was possible to provide comprehensive guidelines to assist the executor to make a decision regarding the reasonableness of the claim, this solution would not

²¹⁹¹ As indicated in 4.4.2, the concept of "reasonable maintenance" often poses challenges for the executor. It is also clear from the discussion in 4.4.8 that the executor could have a conflict of interest when dealing with a claim under the MSSA. The proposed legislative amendments in 8.4 deal with these aspects.

address the issue of the survivor dying or remarrying before the funds paid to him or her have been consumed. I also do not believe that a “tick box” or “checklist” approach is appropriate when dealing with family law matters.

I would therefore suggest that this option is not likely to be a viable solution.

8.3.2 Providing that all claims will be determined by a court of law

This solution follows the position in England and New Zealand where the executor plays no role in the consideration of the maintenance claim and it is provided that all claims are considered by a court of law. It should be noted that the court solution in England and New Zealand assumes that all cases go to court, whilst very few do, as most cases are settled. The judicial guidance enables parties to understand and give effect to the deceased’s duties to family members and especially the surviving spouse, and going to court is therefore the default position if the parties cannot agree. The purpose of this solution is to have a more structured, legal approach to the adjudication of a maintenance claim.

The benefit of this solution is self-explanatory as it removes the responsibility to consider the claim from the executor and places it on the court, which is more skilled and better equipped to deal with such claims. The court is in a position to probe for more detailed information and this should result in a more accurate and reasonable claim.

This solution is not, however, without problems. A court process is bound to be costly and does not seem the appropriate solution for a survivor who has lodged a claim for maintenance because he or she is not able to provide for his or her maintenance needs from own means and earnings. As indicated in 8.2.4, the Estates Act allows for a survivor to approach the court if he or she is aggrieved by a decision the executor made. The relatively few court cases on the MSSA indicate that this option is seldom pursued. The

reason is quite possibly that the survivors who institute maintenance claims do not have the resources to pursue the matter in a court of law. This reality makes the adjudication of a maintenance claim by a court of law impractical. This solution could potentially work if the survivor was not expected to fund the court proceedings and the costs were paid from estate funds. However, this would have negative consequences for the residual heirs of the estate, as the cost of the proceedings would have to be paid from the residue of the estate, thereby reducing the amount available for distribution to the heirs.

Even if this solution could be made financially viable, it is bound to be time-consuming, which will delay the administration of the estate even more than the current process does. As indicated,²¹⁹² the average time for the court in New Zealand to assess an application under the FPA is 425 working days and for an application in terms of the PRA it is 313 working days. If we assume that it will take more or less the same amount of time in South Africa, this delay, coupled with the absence of any provision for interim maintenance, will result in serious prejudice to the survivor. It will also prejudice the heirs as the settlement of their inheritance will be delayed.

It may be a solution to provide that the assessment of the claim will be done by certain courts only, for example the maintenance court. This might reduce costs and the time it will take to finalise the process. Although I have not actively researched this aspect as I do not believe that a court process is a viable option to pursue, anecdotal evidence gathered during my research seems to indicate that all courts in South Africa, including the maintenance courts, are already significantly overburdened and it is doubtful whether it will have any significant impact to limit the assessment of the claim to certain courts only.

²¹⁹² See 7.3.4.2.

Furthermore, having a claim under the MSSA assessed by a court of law does not provide a mechanism whereby unutilised funds can be claimed back in the event of the survivor's untimely death or remarriage.

It is therefore my contention that this solution is not viable, considering the costs and time it will take for a court of law to assess the maintenance claim.

8.3.3 Providing for mediation

The rationale behind mediation is that it provides the parties to a dispute, in this case, the executor, survivor and heirs, with a process in terms of which their differing views regarding the maintenance claim can be dealt with without having to resort to litigation.

Mediation is a process whereby a mediator assists parties to a dispute to identify their disputes, to propose and consider different options to resolve those disputes and to reach an agreement which satisfies both parties.²¹⁹³ The mediator is ideally a neutral and impartial third party²¹⁹⁴ who does not decide the solution to the parties' dispute, but guides them so that they can arrive at a settlement that they agree on.²¹⁹⁵ It is a consensual process in which the parties to the dispute themselves make the decision, therefore giving them control over the decision.²¹⁹⁶

²¹⁹³ De Jong "Mediation and other appropriate forms of alternative dispute resolution upon divorce" in Heaton J (ed) *The law of divorce and dissolution of life partnerships in South Africa* (2014) 582; De Jong "Opportunities of mediation in the new Children's Act 38 of 2005" 2008(71)4 *THRHR* 631; De Jong "A pragmatic look at mediation as an alternative to divorce litigation" 2010-3 *TSAR* 517; Boniface "African-style mediation and western-style divorce and family mediation: reflections for the South African context" 2012(15)5 *PER/PELJ* 378.

²¹⁹⁴ Goldberg "Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular" 1998-4 *TSAR* 752,758; De Jong 2008(71)4 *THRHR* 630; De Jong 2010-3 *TSAR* 517,518; Boniface 2012(15)5 *PER/PELJ* 378.

²¹⁹⁵ De Jong 2008(71)4 *THRHR* 631; De Jong 2010-3 *TSAR* 517; Boniface 2012(15)5 *PER/PELJ* 380.

²¹⁹⁶ De Jong 2008(71)4 *THRHR* 631; Boniface 2012(15)5 *PER/PELJ* 380.

Mediation is a particularly useful tool in family disputes such as divorce and custody of children.²¹⁹⁷ One of its major advantages is that it keeps parties out of court,²¹⁹⁸ which means that the usual cost of litigation is avoided, thereby saving costs.²¹⁹⁹ The fee paid to the mediator is charged in terms of a fixed tariff set by the Minister of Justice and Correctional Services and the parties share the fee equally. Based on my research, it appears that mediators' fees range from a few hundred rand to about R1 500 per hour (depending on the seniority of the mediator), which means that the cost of an average mediation session of a few hours would be between R4 500 and R16 000.²²⁰⁰ This compares very favourably with court fees.

Mediation is a simple process that is easily understandable by the parties, so that they can fully participate.²²⁰¹ It is also a flexible process as it is able to accommodate different cultural and religious systems or convictions.²²⁰² The process is usually quick, and a matter can be resolved in a considerably shorter period than through the traditional court process.²²⁰³

Mediation is a viable option as it could result in a claim that is acceptable to all parties, but it does not provide a mechanism whereby unutilised funds can be claimed back in the event of the survivor's death or remarriage and is therefore in my view not an ideal solution.

²¹⁹⁷ De Jong (2014) 581; Scott-Macnab "Mediation – the procedure of the future" 1989(255) *De Rebus* 211,213; De Jong "International trends in family mediation – are we still on track?" 2008(71)3 *THRHR* 454; De Jong 2008(71)4 *THRHR* 630; De Jong 2010-3 *TSAR* 517.

²¹⁹⁸ De Jong 2008(71)4 *THRHR* 631; Boniface 2012(15)5 *PER/PELJ* 380 fn 7.

²¹⁹⁹ De Jong (2014) 604; Boniface 2012(15)(5) *PER/PELJ* 380 fn 7.

²²⁰⁰ De Jong (2014) 604; Government Notice 854, published in Government Gazette 38163, 31 October 2014.

²²⁰¹ De Jong "Judicial stamp of approval for divorce and family mediation in South Africa" 2005(68)1 *THRHR* 95,97; De Jong 2010-3 *TSAR* 519.

²²⁰² Moodley "Mediation: the increasing necessity of incorporating cultural values and systems of empowerment" 1994(27)1 *CILSA* 46-48; Goldberg 1998-4 *TSAR* 755; De Jong 2010-3 *TSAR* 519,520; Faris *An analysis of the theory and principles of alternative dispute resolution* Unpublished LLD thesis, University of South Africa (1995) 183.

²²⁰³ De Jong 2010-3 *TSAR* 510.

8.3.4 Providing for settlement of the claim by the imposition of a limited interest in favour of the survivor

The purpose of this solution is to ensure that the survivor's claim is met without having to transfer cash or an asset or assets to him or her.

The benefit of this solution is that the survivor's maintenance needs are addressed, but ownership of estate assets is not passed to him or her, thereby ensuring that the residual heirs receive their inheritance. The idea behind this solution is therefore to benefit all parties. The survivor acquires a limited interest which is designed to provide him or her with the required maintenance. The limited interest would typically be a usufruct over an estate asset, or the right to income. The asset will devolve on the residual heirs, but their ownership will be limited to the extent that the survivor will enjoy the fruits of the asset.²²⁰⁴ If the survivor acquires a right to income, the income could either be generated by a specific estate asset or assets, or the heirs of the estate could agree to pay a certain amount of income to the survivor.

This solution gives some peace of mind to the survivor as he or she is ensured of either a place to live in, the right to use an asset or assets and receive income from it, or the right to receive income from the heirs. The heirs also benefit as they acquire ownership of the asset or assets, albeit that their ownership is limited as they cannot enjoy the fruits thereof while the survivor is alive, or they might have to pay income to the survivor.

If the usufruct is over immovable property, it gives the survivor the right to live in and use the property, but it also gives him or her the right to let the property and receive the rental.²²⁰⁵ The survivor could therefore decide to rather live somewhere else and let

²²⁰⁴ Meyerowitz 24.15.

²²⁰⁵ Meyerowitz 24.15.

the immovable property to a third party, which is not ideal from the perspective of the owners of the property. I would therefore submit that a usufruct over immovable property should only be considered as a solution if the survivor's maintenance needs are limited to accommodation, as it will ensure that the survivor actually resides in the property. I would also submit that this solution would only be viable if the heirs and the survivor agree on the terms and conditions of the usufruct and these terms benefit both the survivor and heirs.

The usufruct will be an asset in the survivor's estate and will therefore be subject to estate duty on his or her death.²²⁰⁶ This is not necessarily an issue as the asset itself would in any event have formed part of the survivor's estate had it been transferred to the survivor in settlement of the maintenance claim.

A right to income will typically be created over a particular asset to the extent that the income generated by the asset will be paid to the survivor. Alternatively, the heirs can take on the responsibility to pay income from their own resources to the survivor. As with a usufruct, the survivor's right to income will be an asset in his or her estate and will therefore be subject to estate duty on his or her death.²²⁰⁷ The same comments as above would apply. If the heirs themselves take on the responsibility to pay income to the survivor, they will not be able to deduct the payment when calculating their income tax obligation as it is not an expense incurred in the production of income.²²⁰⁸

This solution ensures that ownership of the assets is vested in the residual heirs, while addressing the maintenance needs of the survivor. It therefore provides a solution for the scenario where the survivor dies earlier than expected or remarries. It does not, however, provide a solution for a scenario where the survivor's circumstances change

²²⁰⁶ Section 3(2)(a) of the EDA.

²²⁰⁷ Section 3(2)(a) of the EDA.

²²⁰⁸ See 4.4.3 fn 871.

significantly for the better, unless the parties expressly agree that the limited right will cease or be re-assessed if that happens.

Although I regard this solution as a viable option, the major disadvantage is that it entails ongoing interaction between the survivor and heirs until the survivor dies, as they are forced to work together on matters such as who is responsible for maintenance and insurance of the property.²²⁰⁹ From the perspective of the survivor this solution is not ideal if he or she is looking for a lump sum payment to gain independence from the heirs. From the perspective of the heirs it is also not ideal if the relationships with them and the survivor is not good. In view of my previous comments about how seldom the survivor and heirs agree as to what constitutes reasonable maintenance, I question the viability of creating a situation where the parties are forced to have a working relationship until the survivor dies. I would therefore not recommend this as a solution, except in very specific circumstances.

8.3.5 Providing that the claim will be settled by periodical payments and re-assessed on remarriage, death or changed circumstances of the survivor

The purpose of this solution is to ensure that the survivor's claim is met without having to transfer cash or an asset or assets to him or her, and to provide both the survivor and the residual heirs with certainty and peace of mind by ensuring that the claim can be re-assessed on an ongoing basis if necessary.

The benefit of providing for periodical payments is that the survivor's needs can be re-assessed on an ongoing basis. The survivor will benefit, as the ongoing payments will address any change in his or her circumstances resulting in increased needs or reduced means and earnings. The residual heirs will benefit by knowing that the claim could be re-assessed if the survivor's circumstances (including his or her means or earnings)

²²⁰⁹ Meyerowitz 24.17.

change to the extent that the claim previously accepted is for an amount in excess of the survivor's re-assessed requirements. As indicated in 8.2.5, although the MSSA provides that the claim will relate to the period until the survivor dies or remarries, it is not possible to predetermine if or when the survivor might remarry; therefore the claim is always calculated on the life expectancy of the survivor. If most claims are settled by way of a cash lump sum or transfer of assets, as appears to be the current norm, the provision for remarriage is of academic value only – once the lump sum has been paid or assets have been transferred to the survivor, unexpended funds cannot be recovered when the survivor remarries. If periodical payments are used to settle the claim, this concern falls away.

The disadvantage of using periodical payments is that it is not practical to allow for periodical payments in a deceased estate as it has a limited lifespan.²²¹⁰ The executor is obliged to finalise the estate as soon as is practically possible and he or she would not be able to keep the estate open until the survivor dies or remarries, or until the survivor's need for maintenance falls away. I agree with Sonnekus²²¹¹ that the only workable solution for this practical challenge is to provide for the creation of a trust, where the trustee takes on the responsibility to make payments to the survivor, and to re-assess the survivor's needs on an ongoing basis. It is interesting to note that clause 2(3)(d) of the Bill on Maintenance of Surviving Spouses²²¹² provided that the executor had "the power to create a trust for the benefit of the survivor in terms of an agreement with the survivor and to transfer assets from the deceased estate to the trust, in settlement of the claim of the survivor or part thereof". The MSSA as promulgated, however, does not include this provision, but rather provides that the executor has the power to enter into an agreement with the survivor and the heirs and legatees having an interest in the agreement, including the creation of a trust. I assume that this change

²²¹⁰ *Seidel v Lipschitz* unreported, case number 24960/11 [2013] ZAWCHC, judgment delivered on 24 October 2013 at par 30.

²²¹¹ 1990-3 TSAR 506; 2010-3 TSAR 636.

²²¹² B86-88 and B2-90.

in wording was intended to clarify that other types of agreements could also be entered into, but I believe the original wording as contained in the Bill is clearer and might have been a better option as it gives more guidance to the executor.

8.3.5.1 Trusts - general

The Trust Property Control Act (hereinafter referred to as the “TPCA”)²²¹³ defines²²¹⁴ a trust as “an arrangement through which the ownership in property of one person is by virtue of a trust instrument²²¹⁵ made over or bequeathed” *inter alia* to the trustee to administer it for the benefit of the persons identified in the trust instrument.²²¹⁶

A trust is typically used as an estate planning tool²²¹⁷ – the trust would be established by a person who owns a valuable asset or an asset that is expected to appreciate in value. He or she transfers ownership of the asset to the trust, so that appreciation in the value of the asset takes place in the trust rather than in the estate of the person, thereby resulting in less estate duty in that person’s estate on his or her death.²²¹⁸ A trust is, however, also a very useful tool for other purposes,²²¹⁹ such as protecting assets²²²⁰ or protecting persons who do not have the capacity to manage assets (for example a minor who does not have contractual capacity or a person with limited financial skills).²²²¹ I therefore believe that it can be a very useful tool in the context of a maintenance claim.

²²¹³ 57 of 1988.

²²¹⁴ Section 1.

²²¹⁵ A trust instrument is defined in section 1 as a written agreement, testamentary writing or court order according to which a trust is created. For purposes of this discussion I will focus only on a written agreement, being a trust deed.

²²¹⁶ The definition also provides for ownership of the assets to be passed to the beneficiaries, but such an arrangement is not relevant for purposes of this discussion and I will focus only on the trust where ownership is passed to the trustees.

²²¹⁷ Geach *Trust law in South Africa* (2017) 434; Klopper “Sekere probleme in verband met inter vivos trusts en getroude persone” 1990(107)3 SALJ 708.

²²¹⁸ *CIR v Estate Lazarus* 1958 (1) SA 311 (A); *CIR v Pretorius* 1986 (1) SA 238 (A); Cameron, De Waal and Solomon *Honore’s South African law of trusts* (2018) 17; Geach 434; 463.

²²¹⁹ Cameron, De Waal and Solomon 16; Geach 433.

²²²⁰ Geach 433; *Penny v Estate Penny* 1937 EDL 392; *Jordaan v Jordaan* 2001 (3) SA 288 (C).

²²²¹ Geach 435; *Collard v Findlay’s Executors* 1907 TS 254; *Ex parte Easton* 1948 (2) SA 535 (C); *Du Plessis v Pienaar* 2003 (1) SA 671 (SCA).

8.3.5.2 Trusts - characteristics

A trust is settled by a person known as the settlor or founder.²²²²

For a valid trust to be created, the requirements are:

- the founder must have the intention to create a trust and the intention must be shared by the prospective trustee(s)²²²³ – this is usually evident from the trust deed which is signed by the founder and trustees;
- the intention must be expressed in a way that creates a legal obligation²²²⁴ – the mere expression of an intention is not sufficient and the founder must either pass ownership to a trustee and place an obligation on the trustee to administer the property for the trust object, or the founder must accept the obligation to ensure that this is done;²²²⁵
- the trust property must be defined with reasonable certainty²²²⁶ – this is usually done by specifying in the trust deed a donation made by the founder to the trust. It is important that the donation is actually made by the founder, or that he or she accepts the obligation to divest him- or herself of ownership of the specified asset – failing this, it might be questioned whether the trust actually came into existence;²²²⁷
- the trust object or purpose must be defined with reasonable certainty²²²⁸ – the object can be personal, which means that certain named or ascertainable persons or classes of persons will benefit,²²²⁹ or it can be impersonal,²²³⁰ for

²²²² Geach 113; I will use the term “founder” in the further discussion.

²²²³ Cameron, De Waal and Solomon 138; Geach 80.

²²²⁴ *Administrators, Estate Richards v Nichol* 1996 (4) SA 253 (C); Cameron, De Waal and Solomon 7; 159; Geach 80; 254.

²²²⁵ *Goodricke & Son (Pty) Ltd v Registrar of Deeds, Natal* 1974 (1) SA 404 (N); Cameron, De Waal and Solomon 159-160.

²²²⁶ *Ex parte Estate Kemp* 1940 WLD 26; *Administrators, Estate Richards v Nichol* 1996 (4) SA 253 (C); Corbett, Hofmeyr and Kahn 396; Cameron, De Waal and Solomon 168; Geach 90.

²²²⁷ Geach 114.

²²²⁸ Cameron, De Waal and Solomon 173; Geach 91; Klopper 1990(107)3 SALJ 705.

²²²⁹ Geach 259.

²²³⁰ *Coetzee v Universiteit van Stellenbosch* 1959 (2) SA 172 (C); *Ex parte Henderson* 1971 (4) SA 549 (D); Geach 253.

example where the trust supports charitable objects or where it is established for the benefit of the community at large or a specific sector of the community;²²³¹

- the trust object must be lawful²²³² – a trust will not be valid if the object is, for example, to fund terrorism or promote racism or gender discrimination.

As indicated above, one of the requirements for a valid trust is that the object must be ascertainable. The trust deed by which the trust is created must therefore provide for the appointment of beneficiaries.²²³³ The beneficiaries could either all benefit from income and capital,²²³⁴ or the trust deed could provide that specific persons benefit from the income and other persons from the capital.²²³⁵ The trust deed should specify whether the trustee is obliged to pay or apply the income to, or for the benefit of, the income beneficiary/ies, or whether he or she is empowered to do so in his or her discretion.²²³⁶ If the trustee is obliged to pay income to a beneficiary, the beneficiary has an immediate entitlement to the income²²³⁷ and therefore has a vested personal right to claim payment of this benefit from the trustee when the income becomes distributable.²²³⁸ This right to the income is an asset that falls into the beneficiary's estate on death or insolvency.²²³⁹ If there is no obligation on the trustee and he or she is merely empowered to exercise discretion to decide whether or not to pay income to a beneficiary, the beneficiary has a contingent right, which is dependent on the exercise

²²³¹ *CIR v Estate Sive* 1955 (1) SA 249 (A); *Braun v Botha* 1984 (2) SA 850 (A).

²²³² *Administrators, Estate Richards v Nichol* 1996 (4) SA 253 (C); *Peterson v Claassen* 2006 (5) SA 191 (C); Cameron, De Waal and Solomon 197; Geach 90.

²²³³ *Harter v Epstein* 1953 (1) SA 287 (A); *Edmeades, De Kock & Orffer v Die Meester* 1975 (3) SA 109 (O); *Khabola v Ralitabo* unreported, case number 5512/2010 [2011] ZAFSHC 62, judgment delivered on 24 March 2011; Cameron, De Waal and Solomon 175; Geach 93; 253.

²²³⁴ *CSARS v Dyefin Textiles (Pty) Ltd* 2002 (4) SA 606 (N); Cameron, De Waal and Solomon 600; Geach 272.

²²³⁵ Cameron, De Waal and Solomon 599; Geach 272.

²²³⁶ Geach 264.

²²³⁷ *Re Allen Trust* 1941 NPD 147; Cameron, De Waal and Solomon 574; Geach 265.

²²³⁸ Cameron, De Waal and Solomon 574; Geach 265; Du Toit "The fiduciary office of trustee and the protection of contingent trust beneficiaries" 2007(18)3 *Stell LR* 477.

²²³⁹ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W); Cameron, De Waal and Solomon 574; Geach 265.

of the trustee's discretion.²²⁴⁰ The beneficiary therefore has merely a *spes* (hope) that the trustee will use income for his or her benefit.²²⁴¹ Such a contingent right or *spes* does not form an asset in the beneficiary's estate on death or insolvency.²²⁴² For practical purposes, especially where the trust is created to maintain a beneficiary, most trust deeds typically empower the trustee to use capital should this be necessary²²⁴³ – this is to provide for a situation where the trustee wishes to assist a beneficiary, but the income of the trust is insufficient for this purpose. A typical example is where a beneficiary requires assistance for extraordinary medical expenses or to purchase a house or establish a business.²²⁴⁴

The trust deed should also provide for the appointment of a trustee or trustees.²²⁴⁵ The trustee of a trust plays a crucial role, as he or she is responsible for managing the affairs of the trust by attending to the administration and disposal of trust property according to the provisions of the trust deed.²²⁴⁶ Trusteeship is an official position²²⁴⁷ and is established by the appointment of a trustee in the trust deed,²²⁴⁸ the acceptance by the appointed trustee,²²⁴⁹ and the authorisation of the trustee by the Master of the High Court.²²⁵⁰

²²⁴⁰ *Burger v CIR* 1956 (1) SA 534 (W); *Hilda Holt Will Trust v CIR* 1992 (4) SA 661 (A); *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W); *Webb v Davis* 1998 (2) SA 975 (SCA); Cameron, De Waal and Solomon 576; Geach 265.

²²⁴¹ *Barnhoorn v Duvenage* 1964 (2) SA 486 (A); *Welch's Estate v CIR* 1992 (4) SA 661 (A); Cameron, De Waal and Solomon 575; Geach 264; Du Toit "The fiduciary office of trustee and the protection of contingent trust beneficiaries" 2007(18)3 *Stell LR* 477.

²²⁴² *Wasserman v Sackstein* 1980 (2) SA 536 (O); Cameron, De Waal and Solomon 575; Geach 265.

²²⁴³ *Ex parte Hulton* 1954 (1) SA 460 (C); Cameron, De Waal and Solomon 373.

²²⁴⁴ Geach 274.

²²⁴⁵ For ease of reference I will use the term "trustee" in the further discussion. It should be noted that a trust will not fail for want of a trustee: *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA); Cameron, De Waal and Solomon 210.

²²⁴⁶ Geach 143; Du Toit 2007(18)3 *Stell LR* 469.

²²⁴⁷ *Hofer v Kevitt* 1998 (1) SA 382 (SCA); *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA); Cameron, De Waal and Solomon 14.

²²⁴⁸ *Metequity Ltd v NWN Properties Ltd* 1998 (2) SA 554 (T); Cameron, De Waal and Solomon 210.

²²⁴⁹ *Marais v Naude* 1987 (3) SA 739 (A); Cameron, De Waal and Solomon 247; Du Toit 2007(18)3 *Stell LR* 470. The acceptance is typically evidenced by the fact that the trustee signed the trust deed.

²²⁵⁰ Section 6(1) TPCA; *Simplex v Van der Merwe* 1996 (1) SA 111 (W); *Lupacchini v Minister of Safety and Security* 2010 (6) SA 457 (SCA); *Hanekom v Voigt* 2016 (1) SA 416 (WCC); Cameron, De Waal and Solomon 251.

A trustee derives his or her powers and duties mainly from the trust instrument,²²⁵¹ but the TPCA and the common law²²⁵² also impose certain duties on a trustee. The trustee occupies a fiduciary position²²⁵³ and is therefore subject to a fiduciary duty.²²⁵⁴ The key focus of this fiduciary duty is the manner in which the trustee administers the trust property²²⁵⁵ for the benefit of the trust beneficiaries.²²⁵⁶ The trustee must therefore conduct his or her administration in utmost good faith and always in the best interest of the trust beneficiaries.²²⁵⁷ This common law standard of care is also contained in the TPCA, which requires²²⁵⁸ a trustee to act with the care, diligence and skill that can reasonably be expected of a person who manages the affairs of another.²²⁵⁹ The trustee must act honestly and in good faith in relation to the trust and the beneficiaries,²²⁶⁰ and must exercise his or her powers in the interest of the beneficiaries and for their benefit.²²⁶¹ The trustee must carry out the terms of the trust deed as far as it is lawful and effective under the laws of the place where the administration of the trust takes place²²⁶² and must exercise independent discretion in all matters except questions of

²²⁵¹ *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA); Cameron, De Waal and Solomon 251; Geach 145.

²²⁵² *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A); *Edmeades, De Kock & Orffer v Die Meester* 1975 (3) SA 109 (O); Geach 145; Kloppe 1990(107)3 SALJ 705.

²²⁵³ Cameron, De Waal and Solomon 13; De Waal "Die wysiging van 'n *inter vivos* trust" 1998-2 TSAR 331; Du Toit 2007(18)3 *Stell LR* 471.

²²⁵⁴ *Sackville West v Nourse* 1925 AD 516; *Doyle v Board of Executors* 1999 (2) SA 805 (C); *Steyn v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB); Geach 216; De Waal "The core elements of the trust: aspects of the English, Scottish and South African trusts compared" 2000(117)3 SALJ 548; Van der Spuy & Van der Linde "Registrasie van onroerende trustgoed in die naam van 'Trustees van tyd tot tyd'" 2002(65)4 THRHR 485,488-489.

²²⁵⁵ *Hofer v Kevitt* 1996 (2) SA 402 (C); *Welch's Estate v CSARS* 2005 (4) SA 173 (SCA); Olivier "Trusts: traps and pitfalls" 2001(118)2 SALJ 224.

²²⁵⁶ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W); *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BHC); *Nel v Metequery Ltd* 2007 (3) SA 34 (SCA); Olivier 2001(118)2 SALJ 224,229.

²²⁵⁷ *Sackville West v Nourse* 1925 AD 516; Olivier 2001(118)2 SALJ 224,229; Du Toit 2007(18)3 *Stell LR* 473.

²²⁵⁸ Section 9(1).

²²⁵⁹ *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA); *Thorpe v Trittenwein* 2007 (2) SA 172 (SCA); *Raath v Nel* 2012 (5) SA 273 (SCA); Geach 203; De Waal 1998-2 TSAR 326,330; Olivier 2001(118)2 SALJ 224,229; Kloppe "Enkele lesse vir trustees uit die *Parker*-beslissing" 2006-2 TSAR 414,421; Du Toit 2007(18)3 *Stell LR* 474.

²²⁶⁰ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W); Geach 216.

²²⁶¹ Geach 210.

²²⁶² *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA); Cameron, De Waal and Solomon 305; Kloppe 1990(107)3 SALJ 705.

law.²²⁶³ The trustee must therefore act objectively when dealing with the beneficiaries and must try as far as possible to balance the needs of the different beneficiaries.²²⁶⁴ This means that, unless the trust deed authorises the trustee to distinguish between the needs of the different beneficiaries, or unless there is a valid reason for doing so, the trustee should as far as possible ensure that beneficiaries are treated equally.²²⁶⁵ It is also important that the trustee must avoid any conflict of interest between his or her personal interests and those of the beneficiaries.²²⁶⁶ Where the trustee is also a beneficiary of the trust, it is inevitable that there might be a conflict of interest and the trustee's actions in such an instance will be even more closely scrutinised to ensure that the conflict does not materialise.²²⁶⁷

In terms of the common law, a trust can terminate by operation of law under certain circumstances, for example by statute, fulfilment of the object, failure of a beneficiary, or destruction of the trust property.²²⁶⁸ Another way is in terms of the provisions in the trust deed. The deed should also provide for termination of the trust, which could occur on a specified date, the happening of a specified event,²²⁶⁹ or a date to be determined by the trustee in his or her discretion.²²⁷⁰ The deed should provide how the remaining capital shall devolve on termination²²⁷¹ – in my experience of reading trust deeds and establishing trusts for settlors, most settlors provide that the capital will devolve on the

²²⁶³ *Ries v Estate Ries* 1912 CPD 390; *Tijmstra v Blunt-MacKenzie* 2002 (1) SA 459 (TPD); *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA); *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA); Cameron, De Waal and Solomon 305; Kloppe 1990(107)3 SALJ 705; Olivier 2001(118)2 SALJ 224,229-230; Du Toit 2007(18)3 Stell LR 475.

²²⁶⁴ *Liebenberg v MGK Bedryfsmaatskappy (Pty) Ltd* 2003 (2) SA 224 (SCA); Cameron, De Waal and Solomon 370-372.

²²⁶⁵ Cameron, De Waal and Solomon 370; Geach 229; Kloppe 1990(107)3 SALJ 705.

²²⁶⁶ *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA); *Tijmstra v Blunt-MacKenzie* 2002 (1) SA 459 (TPD); *Kidbrooke Place Management Association v Walton* 2015 (4) SA 112 (WCC); Geach 216; De Waal "Is the DCFR trust a 'proper' trust? An evaluation from a South African perspective" 2014(1) *Acta Juridica* 235.

²²⁶⁷ *Harris v Fisher* 1960 (4) SA 85 (A); *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA).

²²⁶⁸ Geach 379.

²²⁶⁹ *Gowar v Gowar* 2016 (5) SA 225 (SCA).

²²⁷⁰ Geach 380.

²²⁷¹ *Ex parte Tomson* 1962 (4) SA 763 (W); Corbett, Hofmeyr and Kahn 426-427.

capital beneficiaries in the proportions specified in the trust deed, or on such capital beneficiaries, and in such proportions, as the trustee in his or her discretion decides.

8.3.5.3 Using a trust in the context of the MSSA

I would suggest that a trust could be used as follows when dealing with a claim under the MSSA: the executor will consider and assess the maintenance claim as currently provided in the MSSA. However, I suggest that this be done as referred to in 8.2.1, namely that the executor and survivor agree on the *quantum* of the survivor's maintenance needs at that time. Once the maintenance needs have been agreed, the details can be submitted to an actuary for calculation of the future value of the claim. A trust will then be established with the executor acting as settlor or founder. The income beneficiary of the trust will be the survivor, and the capital beneficiaries will be the residual heirs of the deceased spouse as per the will or the rules of intestacy. Once the trust has been established, the trustee has been authorised by the Master, and the estate has become distributable,²²⁷² a cash amount, an asset or assets, or a combination of cash and an asset or assets, equivalent to the capital value of the maintenance claim, will be paid and/or transferred from the estate to the trustee to administer.²²⁷³ The trustee will be obliged to invest the funds and/or manage the specific assets in such a way that it generates the income required for the maintenance needs of the survivor. If the asset is an immovable property, the trustee may, depending on the needs of the survivor, allow the survivor to live in it, or may enter into a lease agreement with a tenant and use the rental on the property towards payment of the survivor's maintenance needs.

As indicated above, the trust deed should either place an obligation on the trustee to pay income to an income beneficiary or give the trustee the power to use discretion in this regard. I would suggest that for purposes of a maintenance claim under the MSSA,

²²⁷² See 2.5.2.10 for more details on when an estate becomes distributable.

²²⁷³ Section 35(12)(a) of the Estates Act. See 2.5.2.10 for more detail.

the trust deed should provide that the trustees shall pay income to the survivor, but the *quantum* of the income payments will be limited to what was agreed when the claim was accepted. Therefore, if the trust generates more income than the survivor requires, the additional income will be added to the capital and not be paid to the survivor. The deed should also provide that the trustee will have the power to access capital in case the trust does not generate sufficient income to meet the maintenance requirements of the surviving spouse. The trustee and the survivor will have to agree on the frequency of payments, but I suggest that in most instances the payment should be done on a monthly basis, as this would be the most appropriate way to address the survivor's maintenance needs. It would also align with the basic idea of maintenance being an ongoing, regular payment.²²⁷⁴ The trust deed should provide that the trust will terminate on the death or remarriage²²⁷⁵ of the survivor and the capital of the trust at that time will devolve on the capital beneficiaries in the same proportion as they shared in the residue of the deceased spouse's estate.

It is evident from the discussion above about the role of the trustee that it is very important for the effective application of a trust that an appropriate trustee is appointed. To avoid a conflict of interest, the important role played by the trustee requires that he or she should be an independent party and not also a beneficiary of the trust. In my view it would be appropriate for the executor of the deceased spouse's estate to also be the trustee, provided the executor is an independent person or organisation. If the executor is an heir of the deceased estate, I would suggest that a professional trustee be appointed rather than the heir.

8.3.5.4 Advantages of using a trust

Using a trust to provide for periodical payments to the survivor will address the situation where the survivor's circumstances change to the extent that his or her maintenance

²²⁷⁴ See 4.4.3 for a discussion on this aspect.

²²⁷⁵ Remarriage would include entering into a life partnership with a same-sex or heterosexual partner.

needs are reduced after the maintenance claim has been accepted. The trust deed should provide that the trustee must assess the survivor's needs on an ongoing basis and, should the trustee determine that these needs have changed to the effect that the survivor requires less maintenance than initially indicated, the periodical payments will be adjusted accordingly. Furthermore, if the trustee assesses that the survivor's need for maintenance has fallen away, the trustee shall cease payments to the survivor until he or she may again be in a position where maintenance is required. I would suggest that the trust does not terminate if this happens, as the survivor's needs might change again. The maintenance payments will simply be suspended for as long as the survivor does not need maintenance, and the trust will only terminate on the survivor's death or remarriage or if he or she renounces the right to income.

In all of the above circumstances, the remaining capital in the trust on death or remarriage of the survivor will not form part of his or her estate, but will devolve on the capital beneficiaries of the trust, being the residual heirs of the deceased estate. These heirs will therefore not be prejudiced if the survivor should remarry or die before the date indicated by the life expectancy tables as is the case where a lump sum payment is made to the survivor.

From the survivor's point of view, a trust is a good option as he or she will acquire a right to income, which provides certainty that his or her maintenance needs will be addressed. As with the case of a limited interest in favour of the survivor, the right to income from a trust will be an asset in the survivor's estate on death for purposes of calculating estate duty.²²⁷⁶ The value of the right is, however, linked to the income the survivor enjoyed²²⁷⁷ and not to the value of the asset that generated the income, which will result in less estate duty than where the asset itself formed part of the survivor's estate.

²²⁷⁶ Section 3(2)(a) of the EDA; Cameron, De Waal and Solomon 697.

²²⁷⁷ Cameron, De Waal and Solomon 706. Section 5(1) of the EDA prescribes how limited interests are valued.

8.3.5.5 Disadvantages of using a trust

While a trust does address several of the concerns I have raised, it does not address all these concerns. One shortcoming is that it does not give the executor any guidelines to assess the maintenance claim but, as I have already indicated,²²⁷⁸ I do not believe that it is possible to legislate guidelines that will cover all possible scenarios. I would, however, suggest that a lack of guidelines could to some extent be addressed by agreement between the parties as to the survivor's current maintenance needs before an actuary is approached to calculate the claim over the lifetime of the survivor, and the use of a trust to manage ongoing maintenance payments. This should mean that, even if the claim as calculated results in an amount that is higher than would objectively be necessary for the survivor's maintenance, the regular payments will be limited to what the survivor requires, and any unused capital will remain available for the eventual benefit of the residual heirs of the estate.

A trust also does not address the issue of interim maintenance, but I submit that this can to some extent be alleviated by the fact that the process of establishing a trust and paying funds to the trustee can happen relatively quickly. In addition, I would suggest that interim maintenance be addressed by the executor applying section 26 of the Estates Act to release funds from the estate to provide for the subsistence of the survivor.²²⁷⁹

Another aspect of a trust that could raise concern is fees. In my experience, the cost of establishing a trust is typically not that high and should not be cause for concern, but the cost of the ongoing administration could be an issue. The role of a trustee is onerous²²⁸⁰ and the trustee would therefore expect to be compensated accordingly.²²⁸¹

²²⁷⁸ See 8.3.1.

²²⁷⁹ See 2.4.2.2 for more details.

²²⁸⁰ Geach 429.

²²⁸¹ Geach 427.

The TPCA provides²²⁸² that a trustee is entitled to the remuneration fixed in the trust instrument. According to Cameron, De Waal and Solomon,²²⁸³ where a trust instrument appoints a professional trustee such as a trust company, accountant or attorney, it is implied that the trustee will charge fees in line with what is customarily charged by these professions.²²⁸⁴ If the trust instrument neither specifies nor implies a remuneration, the trustee may charge a reasonable remuneration.²²⁸⁵ I submit that the use of the word “reasonable” implies that each case should be considered on its own merits to determine what fees would be reasonable considering the circumstances of that particular trust. In my experience trustee fees are typically charged on a time spent basis or as a percentage of the assets under management of the trustee. The trustee fees will be settled from the trust assets, so it would be important to ensure that these fees are factored in when calculating the amount to be settled in the trust. Although the cost of administering a trust is a potential negative factor, it needs to be noted that the trustee fees should be considerably less than legal fees if the matter was to be heard by a court of law. I would in any event agree with Geach²²⁸⁶ that consideration be given to fixing the trustee’s fee in the trust deed.

Any discussion about the use of a trust would be incomplete if the taxation of a trust is not addressed. The transfer of assets to a trust could result in certain taxes being levied, and the trust itself might be subject to tax on the income and capital gains generated by the trust.

The Transfer Duty Act²²⁸⁷ provides that transfer duty is payable by any person on the value of an immovable property acquired by that person by way of a transaction.²²⁸⁸ The

²²⁸² Section 22.

²²⁸³ At 413.

²²⁸⁴ See also *Griessel v Bankorp Trust Bpk* 1990 (2) SA 328 (O).

²²⁸⁵ Section 22 TPCA.

²²⁸⁶ *Trust law in South Africa* 215.

²²⁸⁷ 40 of 1949.

²²⁸⁸ Section 2(1); *CIR v Freddie's Consolidated Mines Ltd* 1957 (1) SA 306 (A); *Ex parte Sellars* 1958 (4) SA 54 (C); *SIR v Wispeco Housing (Pty) Ltd* 1973 (1) AA 783 (A); Cameron, De Waal and Solomon 713.

reference to “person” includes a trust²²⁸⁹ and the definition of “transaction”²²⁹⁰ is wide enough to include the acquisition of an immovable property by a trust. There are several exemptions relating to trusts,²²⁹¹ but the acquisition by a trust of immovable property as settlement of a maintenance claim under the MSSA is not an exemption. I suggest that such an acquisition should be exempt and base this on the fact that the Transfer Duty Act already contains certain exemptions that apply to deceased estates and spouses. An immovable property transferred from a deceased estate to an heir or legatee who inherits that property in terms of the will of the deceased or the rules of intestacy is exempt from transfer duty.²²⁹² Where a surviving or divorced spouse acquires sole ownership of the whole or any part of an immovable property registered in the name of the deceased or divorced spouse pursuant to the death of the spouse or dissolution of the marriage, the acquisition is exempt from transfer duty.²²⁹³ I submit that, should a trust be accepted as a solution to deal with maintenance claims under the MSSA, the exemptions in the Transfer Duty Act should be extended to also include acquisition of an immovable property by a trust established to deal with settlement of a claim under the MSSA.

The Securities Transfer Tax Act²²⁹⁴ provides²²⁹⁵ for a securities transfer tax to be paid by a person to whom shares in a company are transferred, but there are similar exemptions²²⁹⁶ as those in the Transfer Duty Act. I would therefore submit that these exemptions also be extended as suggested above.

The ITA provides that income tax is payable in respect of taxable income received by or accrued to or in favour of a person (other than a company) during a year of

²²⁸⁹ Section 1.

²²⁹⁰ Section 1.

²²⁹¹ Section 9. The details of these exemptions are not relevant for purposes of this discussion.

²²⁹² Section 9(1)(e).

²²⁹³ Section 9(1)(i).

²²⁹⁴ 25 of 2007.

²²⁹⁵ Section 2(1).

²²⁹⁶ Section 8(1)(h) and (j).

assessment.²²⁹⁷ A trust is included in the definition²²⁹⁸ of “person” and is therefore a taxpayer in its own right and could be taxed on its income and capital gains. The taxation of income and capital gains generated by a trust depends on how the trustee applies the income and gains.²²⁹⁹

- where income has during a tax year been received by, or accrued to, a trust for the immediate or future benefit of an ascertained beneficiary with a vested right to that amount during that year, the income shall be deemed to accrue to the beneficiary and will accordingly be taxed in the hands of the beneficiary.²³⁰⁰ The ITA does not define “vested right”, but there are several judgments in this regard.²³⁰¹ For purposes of this discussion it suffices to say that a vested right applies when a beneficiary is entitled to income in terms of the trust instrument. It also applies where the trustee has a discretion to apply income for the benefit of a beneficiary and exercises that discretion in the year that the income is received by, or accrues to, the trust;²³⁰²
- any income that is not so derived shall be taxed in the trust;²³⁰³
- the aforementioned principles are, however, subject to certain anti-avoidance rules.²³⁰⁴ The most important rule in the context of a trust is the one that provides that where a person had made a donation, settlement or other disposition²³⁰⁵ which is subject to a stipulation or condition to the effect that the beneficiary thereof shall not receive the income or some portion thereof until the happening of some event, so much of the income that accrued in consequence of the donation, settlement or other disposition, that would have

²²⁹⁷ Section 5(1)(c).

²²⁹⁸ Section 1.

²²⁹⁹ Cameron, De Waal and Solomon 659.

²³⁰⁰ Section 25B(1).

²³⁰¹ For example, *ITC 799* (1954) 20 SATC 222; *ITC 1328* (1981) 43 SATC 56; *Hilda Holt Will Trust v CIR* 1992 (4) SA 661 (A); *ITC 1570* (1994) 56 SATC 120.

²³⁰² Cameron, De Waal and Solomon 660.

²³⁰³ Section 25B(1); Cameron, De Waal and Solomon 665.

²³⁰⁴ Section 7.

²³⁰⁵ The words “settlement or other disposition” are to be construed in line with “donation” and therefore also refers to a disposition that has an element of gratuity or liberality: *Ovenstone v SIR* 1980 (2) SA 721 (A); *CSARS v Woulidge* 2002 (1) SA 68 (SCA); *Welch’s Estate v CSARS* 2005 (4) SA 173 (SCA).

been received by the beneficiary was it not for the stipulation or condition, shall be taxed in the hands of the person who made the donation, settlement or other disposition until such time as the event happens.²³⁰⁶ This section typically applies where a person has made a donation, interest-free or low interest loan to a trust and the trust receives income without passing such income on to the beneficiaries. Our courts²³⁰⁷ have ruled that the making of an interest-free or low interest loan constitutes a continuing donation to the borrower which confers a benefit upon such borrower. The courts have also ruled that the exercise by trustees of the discretionary right to pass income to a beneficiary is the happening of an event as referred to in section 7(5). Therefore, if the trustees do not pass a decision to pass the income to the beneficiaries, the income will be taxed in the hands of the person who made the donation, interest-free or low interest loan.²³⁰⁸

The current rate at which a trust's taxable income is taxed is 45%, which is equivalent to the highest marginal rate paid by individuals.²³⁰⁹

The Eighth Schedule of the ITA contains the provisions relating to taxation of capital gains. The same principles apply as for income tax:

- where a resident beneficiary has, or acquires, a vested right in and to a capital gain resulting from the disposal of a trust asset, the gain will be taxed in the beneficiary's hands;²³¹⁰
- where there is no such vested right, the gain will be taxed in the trust;²³¹¹ The taxable gain included in the taxable income of the trust is equal to 80% of the net capital gain;²³¹²

²³⁰⁶ Section 7(5).

²³⁰⁷ *CIR v Berold* 1962 (3) SA 748 (A); *CSARS v Woulidge* 2002 (1) SA 68 (SCA); *CSARS v Brummeria Renaissance (Pty) Ltd* 2007 (6) SA 601 (SCA).

²³⁰⁸ *Hulett v CIR* 1944 NPD 263; *ITC 1033* (1962) 24 SATC 729; Cameron, De Waal and Solomon 670.

²³⁰⁹ Schedule 1 Rates and Monetary Amounts and Amendments of Revenues Laws Act 21 of 2019.

²³¹⁰ Par 80.

²³¹¹ Par 80.

- the aforementioned provisions are also subject to the provision that, where a person had made a donation, settlement or other disposition which is subject to a stipulation or condition to the effect that the beneficiary thereof shall not receive the capital gain or some portion thereof until the happening of some event, so much of the capital gain that accrued in consequence of the donation, settlement or other disposition, that would have been received by the beneficiary was it not for the stipulation or condition, shall be taxed in the hands of the person who made the donation, settlement or other disposition until such time as the event happens.²³¹³

In terms of the changes to the MSSA I propose, the executor of the first-dying spouse's deceased estate, in his or her capacity as such, shall be the settlor of the trust. The question arises whether the settlement of the maintenance claim into the trust could be regarded as a settlement or other disposition as envisaged in the ITA. It is evident that the settlement by the executor will not be done as an act of generosity or liberality on the part of the executor, but rather as a way to facilitate payment of a creditor's claim. I would therefore suggest that the principle established in *Welch's Estate v CSARS*²³¹⁴ that funds that are settled upon a trust established for the purpose of settling the settlor's maintenance obligations to his or her family is not a gratuitous disposal and therefore does not qualify as a donation, should also apply in this case. As indicated, the terms of the trust deed should provide that the trustee shall be obliged to pay income to the survivor. As a result, the survivor shall be entitled to income from the trust, albeit that the *quantum* of the income will be limited to his or her proven needs. This would ensure that the majority, if not all, of the income and/or capital gains used by the trustee to fund the maintenance needs of the survivor will be taxed in the hands of the survivor and not the trust. The survivor will therefore have an additional tax obligation, but he or

²³¹² Par 10(1)(c) Eighth Schedule of the ITA. A natural person's taxable capital gain is equal to forty percent of the net capital gain: par 10(1)(a) Eighth Schedule of the ITA.

²³¹³ Par 70.

²³¹⁴ 2005 (4) SA 173 (SCA).

she would in any event have been liable for the income and capital gains generated by these assets had the claim been settled by way of a lump sum payment, or the transfer of assets. I therefore do not regard taxation as a reason to not pursue the trust as the most suitable solution to settle a claim under the MSSA.

8.4 Proposed amendments to the MSSA

I undertook this research to establish whether my experience in applying the MSSA to actual scenarios is indeed how others in the fiduciary industry also experience it. I believe that I have demonstrated that there are indeed several practical challenges that an executor must deal with when assessing and settling a claim under the MSSA, and that most executors find this problematic.

Having established that there are challenges, this thesis would be incomplete if I did not also offer a solution. The solutions discussed in 8.3 are intended as measures to be applied in the absence of agreement between the survivor and heirs. These solutions are all potentially viable, but to different degrees, as most of them address only some areas of concern, and in some instances they create further issues, for example taxation, possible strained relationships between the survivor and heirs, additional costs, and delays in the estate administration process. I believe that the solution is to utilise a trust as a vehicle to receive the settlement of the maintenance claim, whether by way of a cash payment or the transfer of assets, and to fund the maintenance requirements of the survivor. As indicated, a trust is by no means a perfect solution to the concerns I have raised regarding the practical application of the MSSA, but I submit that it is the most appropriate solution as it addresses most of the concerns raised.

A trust as a solution will, however, not be effective if it remains a voluntary option as currently provided for in the MSSA, and I am therefore of the view that the only way to achieve the desired result is to make the use of a trust mandatory in the absence of an

agreement between the survivor and the heirs and/or legatees. This would entail amending the MSSA to provide for the mandatory creation of a trust in such a scenario. I have attempted to rewrite the MSSA to incorporate this change and certain others that I suggest would make the application of the MSSA easier for the executor. I would suggest retaining the MSSA in a largely unchanged format but adding some provisions to address some of the issues I have raised. (As mentioned in 8.2.1 above, the only deletion that I would suggest is the reference to “in addition to any other factor which should be taken into account” from section 3 of the current Act). The text that follows contains my suggested amendments, that are underlined for ease of reference.

MAINTENANCE OF SURVIVING SPOUSES ACT 27 of 1990

ACT

To provide the surviving spouse or life partner in certain circumstances with a claim for maintenance against the estate of the deceased spouse or life partner, and to provide for incidental matters.

1. Definitions —In this Act, unless the context otherwise indicates—

“court” means a court as defined in section 1 of the Administration of Estates Act, 1965 (Act No. 66 of 1965);

“executor” means an executor as defined in section 1 of the Administration of Estates Act, 1965, or any person who liquidates and distributes an estate on the instructions of the Master;

“life partnership” means a life partnership entered into between same-sex or heterosexual partners in which they have undertaken reciprocal duties of support, and **“life partner”** shall be construed accordingly;

“marriage” includes a marriage recognised in terms of the laws of the Republic and a union recognized as a marriage in accordance with the tenets of any religion, and **“remarriage”** shall be construed accordingly;

“Master” means a Master as defined in section 1 of the Administration of Estates Act, 1965;

“own means” includes any money or property or other financial benefit accruing to the survivor in terms of the matrimonial property law or the law of succession or otherwise at the death of the deceased spouse;

“reasonable maintenance needs” means so much as is required to provide for actual financial needs;

“survivor” means the survivor of a marriage or life partnership dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)) and **“spouse”** shall be construed accordingly;

“trust” means a trust as contemplated in paragraph (a) of the definition of “trust” in section 1 of the Trust Property Control Act, 1988 (Act 57 of 1988).

2. Claim for maintenance against estate of deceased spouse or life partner

- (1) If a marriage or life partnership is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.
- (2) The survivor shall, in respect of a claim for maintenance, not have a right of recourse against any person to whom money or property has been paid, delivered or transferred in terms of section 34 (11) or 35 (12) of the Administration of Estates Act, 1965 (Act No. 66 of 1965), or pursuant to an instruction of the Master in terms of section 18 (3) or 25 (1) (a) (ii) of that Act.
- (3) (a) The proof and disposal of a claim for maintenance of the survivor shall, subject to paragraphs (b), (c) and (d), be dealt with in accordance with the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965).
 - (b) The claim for maintenance of the survivor shall have the same order of preference in respect of other claims against the estate of the deceased spouse as a claim for maintenance of a dependent child of the deceased spouse has or would have against the estate if there were such a claim, and, if the claim of the survivor and that of a dependent child compete with each other, those claims shall, if necessary, be reduced proportionately.
 - (c) In the event of a conflict between the interests of the survivor in his capacity as claimant against the estate of the deceased spouse and the interests in his capacity as guardian of a minor dependent child of the deceased spouse, or in his capacity as executor of the estate of the deceased spouse, the Master shall refer the claim for maintenance to the maintenance court.
 - (d) The executor of the estate of a deceased spouse shall have the power to enter into an agreement with the survivor and the heirs and legatees having an interest in the

agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the survivor or the trust, or to impose an obligation on an heir or legatee, in settlement of the claim of the survivor or part thereof.

(e) In the absence of an agreement in terms of paragraph (d), the executor shall establish a trust for the benefit of the survivor and shall transfer assets from the estate of the deceased spouse to the trust, in settlement of the claim of the survivor or part thereof. The trust shall be settled on the terms and provisions provided in paragraph (f).

(f) The deed of the trust established in terms of paragraph (e) shall provide as follows:

(i) The executor shall be the settlor of the trust;

(ii) The survivor shall be the income beneficiary of the trust;

(iii) The residual heirs, whether in terms of a will or on intestacy, of the estate of the deceased shall be the capital beneficiaries of the trust;

(iv) The survivor shall be entitled to income from the trust, but the income shall be limited to so much as was agreed to represent his reasonable maintenance needs at the time the claim was lodged against the estate of the deceased spouse;

(v) The trustee shall be empowered to use capital of the trust should the income generated by the trust be insufficient to meet the ongoing maintenance needs of the survivor.

(vi) The trustee shall be empowered to re-assess the ongoing maintenance needs of the survivor at regular intervals and shall be entitled to suspend payment of regular maintenance if, in the trustee's discretion, the survivor is able to meet his reasonable maintenance needs from his own means and earnings;

(vii) The trust shall terminate on the remarriage or death of the survivor or when the survivor irrevocably renounces his right to income envisaged under sub-paragraph (iv);

(viii) On termination of the trust, the capital of the trust shall devolve on the capital beneficiaries in the same proportion as they are heirs to the residue of the estate of the deceased spouse.

3. Determination of reasonable maintenance needs

In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account:

(a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees;

- (b) The existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage;
- (c) The standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse;
- (d) The contribution made by the survivor to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.

8.5 Conclusion

It is evident from the research contained in this thesis that the provision of maintenance for a survivor after the death of his or her spouse has been a topic of concern for many years. It took 35 years of legislative process to address this and to provide a statute, the MSSA, in this regard. Since being promulgated in 1990, the MSSA, has remained largely unchanged.²³¹⁵ I believe that it is time for a review.

The research in this thesis has identified and highlighted the practical problems an executor has to deal with when applying the MSSA. Although there have been several developments in this area of the law, particularly in relation to who is eligible to claim as a survivor, it is evident that further development in this regard is necessary to ensure that the MSSA properly serves the purpose for which it was developed. I hope that this thesis, and specifically the proposed amendments to the MSSA, will provide a practical solution to executors when dealing with an MSSA claim and add value to the body of knowledge available to executors on this topic, so that claims under the MSSA can be dealt with effectively and practically.

²³¹⁵ See 4.1.

APPENDIX A

For how many years have you administered estates?	
1. Less than 5	
2. 5-10	
3. More than 10	
How many claims under The Maintenance of Surviving Spouses Act (MSSA) on average have you had to consider?	
1. Less than 5	
2. 5-10	
3. More than 10	
Based on your experience, how often are maintenance claims under the MSSA lodged against an estate?	
1. 1 in 10 estates	
2. 1 in 20 estates	
3. 1 in 30 estates	
4. 1 in 50 estates	
5. Less than 1 in 50 estates	
Based on your experience, what impact does the lodging of a maintenance claim have on the administration process?	
1. No impact at all	
2. The administration process is delayed by up to 3 months	
3. The administration process is delayed by 3 months or more	
How was the average maintenance claim accepted by you settled?	
1. Cash lump sum	
2. Periodic maintenance	
3. Cash lump sum for a portion of the claim and periodic maintenance for the balance	
4. Transfer of estate asset/s	
5. Cash lump sum for a portion of the claim and transfer of asset/s for the balance	
Have you ever completely refused a maintenance claim?	
1. Yes	
2. No	

If you have answered “yes” to the previous question, indicate the reason for refusing the claim	
1. The survivor could not prove inability to provide for his/her own maintenance needs	
2. The survivor could not provide sufficient information about his/her own means and earnings	
3. The estate did not have sufficient funds to cover the claim	
4. The claim was lodged by a heterosexual life partner of the deceased	
5. Other reasons	
Have you ever accepted a maintenance claim for a lesser amount than the amount claimed by the surviving spouse?	
1. Yes	
2. No	
3. Additional comments	
Has an objection in terms of section 35(7) of the Administration of Estates Act ever been lodged against a decision you took about a maintenance claim?	
1. Yes	
2. No	
Have you ever entered into an agreement with the surviving spouse and heirs of the estate as envisaged in section 2(3)(d) of the MSSA?	
1. Yes	
2. No	
If you answered “yes” to the previous question, by whom was the agreement initiated or suggested?	
1. The executor	
2. The surviving spouse	
3. The heirs	
4. The surviving spouse and heirs together	
In your opinion, what level of guidance does the MSSA give the executor to assess the reasonable maintenance needs of the surviving spouse?	
1. No guidance	
2. Some guidance but not enough	
3. Sufficient guidance	
If you chose “No guidance” or “Some guidance but not enough” in the previous question, indicate the nature of the guidance you would like to see in the MSSA – tick all the appropriate options	
1. To determine the survivor’s reasonable maintenance needs	
2. To determine the survivor’s standard of living during the marriage	

3. To determine the survivor's existing and expected means, earning capacity, financial needs and obligations	
On a scale of 1 to 10, with 1 being very difficult and 10 being very easy, how easy or difficult do you find it to determine the standard of living of the survivor during the subsistence of the marriage?	
<i>Insert number in column to the right</i>	
On a scale of 1 to 10, with 1 being very difficult and 10 being very easy, how easy or difficult do you find it to determine expected means and earning capacity of the survivor?	
<i>Insert number in column to the right</i>	
On a scale of 1 to 10, with 1 being very difficult and 10 being very easy, how easy or difficult do you find it to determine the financial needs and obligations of the survivor?	
<i>Insert number in column to the right</i>	
On a scale of 1 to 10, with 1 being very difficult and 10 being very easy, how easy or difficult do you find it to assess whether the following needs typically claimed for as part of a maintenance claim are reasonable?	
<i>Insert number next to each item in column to the right</i>	
1. Food and cleaning products	
2. Vehicle maintenance and petrol	
3. Hairdresser	
4. Cosmetics	
5. Subscriptions to magazines	
6. Subscriptions to DSTV/Showmax/Netflix	
7. Entertainment	
8. Donations	
9. Holiday costs	
10. Telephone and cellphone costs	
11. Garden services, pool services, domestic cleaning services	
12. Gym contract	
Section 3 of the MSSA provides that the executor shall take into account certain specified factors "in addition to any other factor which should be taken into account" when assessing reasonable maintenance needs. Do you feel comfortable with the responsibility placed on the executor to consider "any other factor"?	
Yes	
No	
What would you typically consider as "any other factor"? Tick all the appropriate options.	
1. Whether the spouses were living together or were separated at the time of death	
2. Whether the survivor has family members who can assist him/her	

3. Whether the survivor is the parent of the residual heirs	
4. The financial situation of the residual heirs	
The MSSA provides that a maintenance claim shall be dealt with by the executor. Regardless of practicalities such as cost and time, who do you think is most suited to consider a maintenance claim?	
1. The executor	
2. The Master	
3. A court of law	
Optional comments	

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